REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

High Court of Chancery,

DURING THE TIME OF

LORD CHANCELLOR ELDON.

VOL. I.

1812—1813. 52—53 GEO. 3.

BY

FRANCIS VESEY, AND JOHN BEAMES,

ESQRS. OF LINCOLN'S INN,

BARRISTERS AT LAW.

LONDON:

PRINTED FOR REED AND HUNTER, LAW BOOK-SELLERS, BELL-YARD, LINCOLN'S INN;

AND V. DELANY, FOUR COURTS, AND 165, CAPEL STREET, DUBLIN.

1813.

S. Brooke, Printer,
35, Paternoster-Row, London.

Lord Eldon,................................Lord Chancellor.
Sir William Grant,.................*Master of the Rolls.*
Sir Thomas Plumer,..................*Vice-Chancellor.*
Sir William Garrow,.............*Attorney-General.*
Sir Robert Dallas,.... ....*Solicitor-General.*

TABLE

OF

REPORTED CASES.

N.B. "*Versus*" always follows the Name of the Plaintiff.

A.

B.

Carlen

Howard

TABLE OF REPORTED CASES.

Richardson,

TABLE

OF

CITED CASES.

Manuscript; and those in Print impeached, corrected, or otherwise particularly noticed.

Glassford

Thompson



CASES

IN

CHANCERY, &c.

1812, 53 *Geo.* 3.

BLYTH *v.* ELMHIRST. 1812, *Oct.* 31.

THE MASTER OF THE ROLLS, *for* THE LORD CHANCELLOR.

A BILL having been filed by the Plaintiffs, as Vendors, against the Defendant, as Purchaser, for a specific Performance, the Defendant by his Answer, admitting the Agreement, alledged Laches on the Part of the Plaintiffs, in not compleating their Contract in due Time, as a Ground for his not being compelled to perform it. A Motion was made by the Plaintiff, for a Reference to the Master, to look into the Title.

Reference of Title before Decree only, where the Title alone is disputed: refused therefore, where the Purchaser on other Grounds resisted Performance.

Sir *Samuel Romilly*, and Mr. *Horne*, for the Defendant, resisted the Motion, as unusual; where other Matters are in Dispute, besides the Validity of the Title. The Defendant insisting by his Answer upon Laches, the Plaintiffs at the Hearing may be entitled to no Decree; and the Reference therefore is premature.

1812. BLYTH v. ELMHIRST.

Mr. *Hart*, and Mr. *Parker*, in support of the Motion, contended, that the Application was sanctioned by recent Decisions of the *Lord Chancellor;* and desired Time to produce Cases.

The MASTER *of the* ROLLS.

I certainly must have Cases produced; for the Practice, if there be any such Practice, has been very recently introduced. I have always understood, that the only Case, in which the Court would make such an Order, is, where the Title alone is in Dispute.

Nov. 13. The Motion having stood over, that Authorities might be produced, was this Day mentioned before the *Lord Chancellor*. No Instance was produced: but it was still insisted, that such Orders had been made; and the Reference could do no mischief.

The Lord CHANCELLOR.

I do not recollect such an Instance: but I take the Rule to be this. Upon a Bill for the specific Performance of an Agreement, until that Practice, upon which this Application is made, was introduced, the first Issue to be determined was, whether the Agreement is to be performed, or not; and accordingly the Decree is always prefaced by a Declaration, that the Agreement ought to be performed. Where the Defendant by his Answer says, there is no Objection to the Agreement, except what arises from the Circumstance, that the Plaintiff cannot make a Title, the Court has conceived itself to have an Authority in the Answer, equivalent to that Declaration in its own Decree, that the Agreement ought to be performed: a Sort of Confession by the Answer, that it ought to be executed; and therefore upon such an Answer

the Court has gone the Length of directing a Reference to the Master to see, whether a Title can be made: but, if the Answer, upon Reasons solid or frivolous, insists, that the Agreement ought not to be executed, that puts the Plaintiff in this Situation; that he is to look into the Answer; and if he finds nothing in it, that will avail the Defendant to resist the Performance, he either sets down the Cause on Bill and Answer; or, if there is any thing to disprove, takes another Course. Where the Record furnishes that Question, whether the Agreement should be carried into Execution, unless the Objection is removed by Consent, that is the first Question to be decided; and I have no Recollection of breaking in upon that; the Party being unwilling, that it should be broken in upon; and saying, he will have the Cause heard. In all the Orders, made before the Vacation, the Defendant had taken Possession.

The Motion was refused.

LINCOLN'S INN HALL.
1812, *Nov.* 5.

WILLIAMS *v.* BIRD.

THE MASTER OF THE ROLLS, *for* THE LORD CHANCELLOR.

Order under the Statute 36 *Geo.* 3 *c.* 90. upon Proof, that One Trustee was abroad, and absconding Bankrupt, and not likely to return, that the remaining Trustee should transfer Stock into the Names of himself and another Person appointed a Co-Trustee.

A PETITION, presented by *Samuel Grimes* and *Elizabeth* his Wife, stated, that by a Deed-Poll, dated the 25th of *November*, 1801, the Petitioner *Eliza-*

 beth

1812. WILLIAMS v. BIRD.

beth Grimes, by virtue of the Power, given to her by a Settlement, appointed *George Sly* and *John Millard* to be Trustees, in the Place of Two other Persons, and to act in the Trusts of the Settlement; that *Millard*, who was appointed Receiver, invested certain Sums of Money, being Part of the Petitioner *Elizabeth Grimes's* Share of the Rents and Profits of Real Estates, in the Purchase of different Sums to the Amount, in the whole, of £438:1*s*:8*d*. in the 3 *per Cent. Bank Annuities*, in the Names of *Sly* and *Millard*, upon the Trusts of the Settlement; and by the said Deed-Poll it was declared, that they should stand possessed of the said £438:1*s*:8*d*. and other Stock, and of the Interest and Dividends thereof, upon the said Trusts; which Funds remained standing in their Names accordingly.

The Petition further stated, that *Sly* became insolvent; and absconded in *March* 1803, and a Commission of Bankrupt issued against him; under which he had been declared Bankrupt; that he never surrendered; but departed the Kingdom, and went beyond Seas; and had not hitherto returned; that, if now living, he is resident in some Foreign Country, and incapable of acting in the Trusts of the Settlement.

The Petition then set forth, that *Elizabeth Grimes* had, by another Deed-Poll, in 1812, appointed *Thomas Mitchell*, a Trustee with *John Millard* in the Place of *Sly*; and, submitting, that by virtue of the Act 36 *Geo.* 3. c. 90, (*a*) *Millard*, as one of the present Trustees of the said Trust Funds, was alone competent under the Order of the Court to make a Transfer into the joint Names of himself and *Mitchell*, upon the Trusts of the Settlement, prayed an Order accordingly.

(*a*) *Shaw* v. *Wright*, 3 *Ves.* 22; the Case which gave Occasion for this Act of Parliament.

Mr.

1812. WILLIAMS v. BIRD.

Mr. *Johnson*, for the Petitioners, stated, that the Bank of *England* would not suffer the Transfer to be made without an Order; and suggested, whether an Inquiry was necessary.

The MASTER *of the* ROLLS, upon the Affidavit of the Solicitor to the Commission, stating the Facts of the issuing of the Commission, that the Bankrupt did not surrender, and that the Deponent has been informed, and believes, that the said *George Sly* absconded from this Kingdom, and went to *America*, or to some Parts beyond the Seas, and had never since returned, and is not likely ever to return to this Kingdom, made the Order.



1812. *Nov.* 11. 13.

THE ROYAL BANK OF SCOTLAND, *Ex parte.*

Upon Petition to stay a Bankrupt's Certificate Affidavits, filed after the Petition presented, admitted only in Reply; according to the General Order (16th *Nov.* 1805.)

General Rule, that a Petition to stay a Bankrupt's Certificate failing is dismissed with Costs; unless Misconduct of the Bankrupt.

THE Object of this Petition was to supersede a Commission of Bankruptcy, and that the Certificate of the Bankrupts might be stayed.

Sir *Arthur Piggott*, and Mr. *Cullen*, in support of the Petition, applied for Leave to file an Affidavit.

Sir *Samuel Romilly*, Mr. *Hart*, and Mr. *Montague*, for the Assignees.

The Lord CHANCELLOR.

It is now clearly settled by Lord *Rosslyn's* General Order (*a*) that a Petition to stay a Certificate must be sup-

(*a*) 12th *April*, 1796. 2 *Co. Ba. La.* 292.

1812. The Royal Bank of Scotland, *Ex parte.*

ported by Affidavits, filed at the Time of presenting it; which has been adhered to so tenaciously, that a Variation, I believe by an Order of mine (*a*), has gone to this Extent only; that, if Affidavits in Reply are necessary, they may be made Use of, notwithstanding that Order; and, giving leave to file this Affidavit, I desire to be understood, that it is not my Opinion that such Affidavit, if tendered, could be read.

Such being the Rule, I have done this without Scruple; where a Petition has been presented to stay a Certificate, and, upon the Fact of a Debt, proposed to be proved, and the Bankrupt applied upon the Ground, that it would not turn the Certificate, I have directed the Secretary, or the Commissioners, to look into the Proofs with that View; and, if they certified accordingly, I have not delayed the Certificate.

As to the Petition to supersede the Commission, I see no Difficulty in ordering that Petition to be immediately heard, without Prejudice to what may be urged, as to any Suit going on in the Court of Session in *Scotland.*

Nov. 13. The Petition, having been withdrawn, a Question arose as to the Costs.

Sir *Samuel Romilly,* Mr. *Hart,* and Mr. *Montague,* insisted, that it is almost of course, that a Petition to stay a Certificate shall, if dismissed, be dismissed with Costs; and, though this Petition had also another Object, it was a proper Case for Costs: a great Body, contending with Individuals; whose Certificate had been stayed; which

(*a*) 16th *Nov.* 1805. 2 *Co. Ba. La.* 294. 11 *Ves.* 542.

would

1812.
The
ROYAL BANK
of SCOTLAND,
Ex parte.

would not have been permitted, if the *Lord Chancellor* had been aware that this Debt would not turn the Certificate.

Sir *Arthur Piggott* and Mr. *Cullen*, denied, that it is almost of course to give the Costs; and contended, that this was not a Case, to be so marked: the Petitioners, Creditors to the Amount of £58,000, residing at a great Distance; and unacquainted with the Practice here; and the Certificate being stayed only a few Days.

The Lord CHANCELLOR.

The general Rule certainly is, that, where a Petition to stay a Certificate fails, the Petitioner pays the Costs; unless in the Transaction there is some Misconduct on the Part of the Bankrupt. Here you have not fixed any Misconduct upon the Bankrupts; and therefore the Costs, if demanded, must be paid; but merely by the Effect of the general Rule; not as setting any Mark upon the Conduct of the Petitioners. Bankrupts are frequently crushed by the Expence of supporting their Certificates; which has produced the Rule, that they shall have the Costs, if the Opposition to the Certificate does not succeed; unless in maintaining it there is some Species of Misconduct; which perhaps may not affect the Certificate; but still may form a Ground for refusing the Costs.

The Petition was dismissed with Costs (*a*).

(*a*) *Ex parte Gardner, Post.*

1812.
Nov. 11. 16.

STAINES *v.* MORRIS.

Under a Contract for the Assignment of a Term, whether from the original Lessee, or a mesne Assignee, The Purchaser must covenant for Indemnity against Payment of Rent and Performance of Covenants; though he cannot have a Covenant for the Title from the Assignor; as being an Executor; and also by express Stipulation.

Costs do not follow the Event of the Suit; where a fair Question is raised.

THE Bill filed in this Cause, prayed the specific Performance of an Agreement, entered into by the Defendant, for the Purchase of Two Leasehold Dwelling Houses, Part of the Estate of the late Sir *William Staines*. A specific Performance was decreed at the *Rolls*; and, an Inquiry was directed, whether the Indenture of Assignment, tendered by the Defendant, to the Plaintiffs, on the 24th of *December*, 1807, for their Execution, was a proper Assignment.

The Master's Report stated, that the Sale was by Auction, on the 10th of *November*, 1807, with public Notice, in the Presence of the Defendant, and a particular notice previously to his Agent, that the Vendors, who were described in the Particular as Executors and Devisees in Trust, would not covenant for the Title; as Executors never did covenant farther, than that they had done nothing to encumber. By the Abstract of the Title it appeared, that the original Lease was made on the 13th of *February*, 1793, to *George Clarke;* who, by a Deed-Poll, dated the 26th of *September*, 1795, assigned the Premises to Sir *William Staines*, for the Remainder of the Term, subject to the future Rent and Covenants. That Assignment, which was executed by *Clarke* only, contained a Covenant on the Part of Sir *William Staines*, for himself, his Executors, Administrators and Assigns, to pay the Rent, and perform the Covenants, in the original Lease reserved and contained on the Tenant or Lessee's Part; and to indemnify *Clarke*, his Heirs, Executors, and Administrators, from the same; and under that Assignment the Testator took the Premises.

The

The Report farther stated, that, notwithstanding it was expressly agreed at the Sale, that the Plaintiffs would not covenant for the Title, the Draft of the Assignment, as prepared by the Defendant, contained on the Plaintiffs' Part Covenants, that they had done no Act to encumber; that notwithstanding any Act by the Plaintiffs, or by Sir *William Staines*, to the contrary, the Lease was valid; that the Plaintiffs had absolute authority to assign: for quiet enjoyment, free from all Incumbrances by them or Sir *William Staines*; (subject only to the Rent and Taxes); and for farther Assurance; with the following Covenant, on the Part of the Defendant: "that "he the said *Thomas Morris*, his Heirs, Executors, "Administrators, or Assigns, shall and will well and "truly pay, perform, fulfil, and keep the Rents, Cove- "nants, and Agreements in and by the said in Part re- "cited Indenture of Demise or Lease reserved and con- "tained, and which, on the Lessees' Part, are or ought "to be paid, performed, fulfilled, and kept, for or in "respect of the said Premises, hereby assigned or in- "tended so to be, or any Part thereof, from and after "the 25th Day of *December* instant, for and during the "Remainder of the said Term of Fifty-seven Years."

The draft was returned; all the Covenants on the Plaintiffs' Part, except that they had done no Act to encumber, being struck out; but the Covenant of the Defendant to pay the Rent and perform the Covenants being left standing. The Defendant's Solicitor afterwards sent to the Plaintiffs' Solicitor the Assignment engrossed; omitting that Covenant; but not communicating, that he had omitted it. That Omission being observed by the Plaintiffs' Solicitor, he returned the Engrossment and Draft; insisting, that the Defendant's Covenant should be restored; and the Defendant on the 24th of *December*, 1807,

1812. STAINES v. MORRIS.

1807, tendered the Deed for Execution; as it stood, without that Covenant.

The Master stated his Opinion, that the Indenture of Assignment, tendered by the Defendant to the Plaintiffs, for their Execution, was a proper Assignment.

To that Report, an exception was taken by the Plaintiffs.

Sir *Samuel Romilly*, Mr. *Raithby*, and Mr. *Preston*, in support of the Exception, cited *Pember* v. *Mathers* (*a*). *Co. Litt.* 231, (*a*). *Litt. S.* 667. *Shep. Touchst.* 177. *Shep. Abr.* 539. *Finch's Law*, 109.

Mr. *Richards*, Mr. *Hart*, and Mr. *Hall*, for the Master's Report, cited *Walker's* Case (*b*); contending, that, if the late Sir *William Staines* had improvidently taken upon himself an Obligation, the Law did not cast upon him, it did not follow, that in Equity the Assignee was bound to indemnify him in respect of that Obligation.

The Lord CHANCELLOR.

Nov. 11.

I take the Circumstances of this Case to [illegible], that there was an original Demise to *Clarke*, afterwards assigned to Sir *William Staines*; and by that original Demise the Premises were of course let, yielding and paying the Rent, and performing the Covenants: but beyond that I take it, that there was an express Covenant for Payment of the Rent and Performance of the Covenants, and the usual Covenant on the Part of the Lessor, that the

(*a*) 1 *Bro. C.C.* 52.

(*b*) 3 *Co.* 22, and *Siderfin*, 402.

Lessee,

Lessee, paying the Rent, and performing the Covenants, should enjoy the Premises for the Term. Suppose, instead of an Assignment, actually executed by *Clarke*, the original Lessee, to Sir *William Staines*, the Question had occurred upon an Agreement between them for the Purchase and Assignment of the Term: and a Bill, filed for the Execution of that Agreement. The Question then would be, what ought to be the Nature, Form and Terms, of the Instrument, by which that Agreement was to be specifically performed.

1812.

STAINES
v.
MORRIS.

It is clear, that, where a Lessee covenants, that he, his Executors, Administrators and Assigns, will pay the Rent, and perform the Covenants, though he parts with the Possession, and though many subsequent Assignments have taken place, he remains, in the Case of an express Covenant at least, liable during the whole Term. As to an Assignee there are Two Ways of putting it. That an Assignee is liable during his own Possession is clear: whether he remains liable, after his Possession determines, is a very different Consideration: but the Point in such a Case as I have stated, a Bill for the specific Performance of an Agreement to assign, would be, what is the equitable Situation of the original Assignor and the Assignee, taking from him during the Remainder of the Term.

Lessee under express Covenant to pay the Rent, and perform the Covenants, liable during the whole Term, notwithstanding Assignments.

Distinction as to Assignee; though liable during his own Possession.

In this Case Sir *William Staines* would be bound to enter into the ordinary Covenants for the Title; and there is no Instance of an Assignment, drawn with proper Caution, which is not made expressly subject to Payment of the Rent and Performance of the Covenants, on the Part of the Lessee, his Executors, Administrators and Assigns, reserved; for though, if the Assignee should part with the Possession, the Lessor might not be able to recover at Law against that Assignee, yet, if the original Assignor

enters

1812.

STAINES v. MORRIS.

enters into a Covenant for the Title, and the Assignee takes the Premises, in the Question, as between the Assignor and Assignee, the former has a Right to say to the latter, "you stand as between us in the Situation, in "which I originally stood to the Lessor; and, if he "under the express Covenant resorts to me, you taking "the Premises from me, it is fit, that the Rent, if paid "by me, should be reimbursed to me by you." This produces these Covenants of Indemnity.

If therefore this stood upon Agreement, the proper Execution of such an Agreement would be an Assignment by *Clarke*, covenanting for the Title; and Sir *William Staines* on the other Hand entering into those Covenants, implied and expressed, which are intended on his Part to be executed, where they are both expressed and implied: an Assignment, not only subject to Payment of Rent and Performance of the Covenants; but the Instrument, executed and accepted by him, containing an express Covenant to pay the Rent and perform the Covenants. Sir *William Staines*, having accepted the Assignment, dies; and his Executors propose it to Sale. This is not a Case, in which the Court will look at it with reference to the Considerations, that occur, where the original Contract is silent, as to what is to be done on the one Side and the other: but the Vendors bargaining in the Article of Sale, that they will not enter into a Covenant for the Title: the Purchaser upon the Conditions of Sale not bargaining, that by reason of that there shall be any of the usual Covenants on his Part abstracted om the Assignment. I think farther, that this would not alter it: the Executors, as Executors, would not be bound to enter into such a Covenant; but by the express Terms they were not to do so.

When the Draft was laid before the Plaintiffs' Solicitor, these

these Covenants for Title were struck out. The Question is reduced to this. The Equity is clear, that he, who takes an Assignment of a Term, shall take it, giving a Covenant of Indemnity to the Assignor against the Payment of the Rent and the Performance of the Covenants, and there is no Distinction between the Cases of Assignment by the original Lessee, and by an Assignee of that original Lessee; the Propriety of enforcing that Covenant being as manifest in the Case of the Assignee, that he may be indemnified in respect of his parting with the Possession, out of which the Duty to pay the Rent accrues, independent of actual Covenant, as in the Case of Assignment by the original Lessee. It is however said here, that, as there is no Covenant for the Title, there can be no Covenant for Indemnity. I do not admit that. The Purchaser, knowing, he is not to have a Covenant for Title, gives a Price accordingly for the Estate, without such Covenant. He buys the Covenant of the original Lessor, and the Title, which the Executors of the Lessee can give him without the Benefit of such a Covenant as he would have had, if the original Lessee had been Lessor. Then why is the Assignor not to have a Covenant against the Rent? The Purchaser knows, that the Title may, or may not, be disturbed; and if there is no Covenant for Indemnity against the Rent, the Consequence is, that the Lessor, having the original Lessee liable to pay the Rent for Premises, deteriorated perhaps by Fire, and the Landlord not bound to re-build, may, though he has the Power, decline to evict for Non-payment of Rent; as the original Lessee, though not the Assignee, may be able to pay; and, if there is a mesne Assignee, and the original Lessee on making over his Title has got an Indemnity, why should not the mesne Assignee recover from the Assignee, who has the Possession, in respect of which such a Covenant is entered into?

It

1812. STAINES v. MORRIS.

It is said, Sir *William Staines's* Estate may not be liable. It would not be liable for the Value of the Premises in the Case of Eviction by a Stranger: but then, it must be recollected, the Rent ceases. It is said, Sir *William Staines* would not be liable to *Clarke*: but he would clearly. First, he has taken the Premises subject to Payment of the Rent and Performance of the Covenants; and even without an express Covenant he could not in Equity say, that he had taken from the Lessee an Assignment, subject to this Condition, that he would pay the Rent, and perform the Covenants; and yet, holding the Premises, insist that the Lessee, as Assignor, should in his Place be subject to pay the Rent and perform the Covenants; but it does not rest upon his general Liability under those Words; as here is an express Covenant that Sir *William Staines* will pay the Rent and perform the Covenants; and then even a Court of Law, certainly this Court, would not suffer him to avail himself of the Circumstance, that he had not executed the Instrument. Unless he make out, that the Non-Execution was a Consequence of some Alteration, that notwithstanding the Covenant it was not intended, that he should take, he would either by the express or implied Covenant, be liable to *Clarke*, if called on by the Lessor; and then, attending to the Circumstances and Conditions of the Contract, and the Equities of the Case itself, upon which the Price must be considered as calculated with reference to the Securities in this Court, if the Assignment is to be executed, the Covenant for Indemnity must be inserted.

The Exception was allowed.

The Lord CHANCELLOR.

Nov. 16. Upon the Question of Costs in this Cause the Fact is admitted, that it was expressly stated at the Sale, though that

1812.
STAINES v. MORRIS.

that was not necessary, that the Executors were not to covenant for the Title. The Draft of the Assignment, as originally drawn by the Defendant's Agent, notwithstanding what had passed at the Sale, contained a Covenant on the Part of the Executors for the Title. The Plaintiffs' Solicitor struck out that Covenant; leaving the Defendant's Covenant for Indemnity; and both Parties left the material Words, as they appear to me, in the *Habendum*, "subject to Payment of the Rent "and Performance of the Covenants henceforth to be paid "and performed on the Lessee or Tenant's Part."

The Draft, sent thus reformed, to the Defendant's Solicitor, was by him engrossed; without any Communication to the Plaintiffs omitting the Defendant's Covenant, which was in the Draft, as settled for the Plaintiffs, to pay the Rent, and perform the Covenants: which really in Point of legal Effect is a Covenant, upon which no Action can be brought, except by the Person, with whom it is entered into; and no Damages can be recovered, unless that Person has suffered Damage by being called upon to pay. Under these Circumstances, the Engrossment, thus tendered without any Communication to the Plaintiffs' Agent, that the Covenant, which he had left in the Draft, settled by him, had been struck out, whether properly, or not, is immaterial, I must hold according to all professional Conduct, that a Communication ought to have been made, that a Covenant, which according to the settled Draft was to be a Part of the Assignment, had been omitted in the Engrossment. It is clear therefore, the Defendant ought to pay the Expence, occasioned by that: but the Question I have to decide is, not, whether the Conduct of either Party was right or wrong up to that Period; but whether there was a fair Ground for Dispute as to the Insertion of this Covenant. The Costs of the Action against the Auc-

tioneer

1812. STAINIS v. MORRIS.

tioneer must be paid by the Defendant. As to the Costs of the Suit in Equity, it is in many Cases very hard, that Costs should follow the Event of the Cause; yet all my Experience has persuaded me, that it is much to be wished that the Course of the Court was so. Certainly however, that is not the present Course of the Court. Where there is a fair Case for Consideration, it is not the Course to visit the Party, who fails with Costs. Upon the Question in this Cause, which I separate from all Questions upon the Propriety of previous Conduct, my Opinion has never fluctuated: but, the Master having expressed his Opinion, that this Covenant ought not to have been inserted, and considering what passed at Law, that the Judges would not decide the Case, until they had the Opinion of this Court, and that professional Men have differed upon the Question, it would be too presumptuous in me to set such a Value upon my own Opinion by marking the Resistance of the Defendant with Costs.

The Costs at Law therefore must be paid; and the Decree must be taken without Costs.

CHAPLIN v. COOPER.

1812. *Nov.* 12.

Injunction obtained by Obligor in a joint and several Bond; the Co-obligor not a Party.

Execution upon a joint Judgment, with Notice to the Sheriff of the Injunction, and Directions not to take the Plaintiff in Equity, not a Breach of the Injunction.

ON the Dissolution of Partnership between the Plaintiff and Defendant, the Stock in Trade, Book-Debts, and Good-Will, were assigned to the Plaintiff, in

Consideration

1812.
CHAPLAIN
v.
COOPER.

Consideration of £1200, to be paid by Instalments; to secure which, the Plaintiff, and *Hamilton* as her Surety, gave their joint and several Bonds to the Defendant, and a Warrant of Attorney to enter up Judgment against them, as on a *Mutuatus*.

Judgment was accordingly entered up against the Plaintiff and *Hamilton*, jointly. The last Instalment of £ 900 having become due in *April* last, the Plaintiff filed her Bill; alledging Errors in the Amount of the Debts; praying an Account; an Abatement out of the Instalment; and an Injunction to stay legal Proceedings against the Plaintiff.

To this Bill, *Hamilton* was not a Party.

The Plaintiff obtained the common Injunction for want of an Answer; restraining, "all farther Proceedings at "Law, against the said Complainant, touching any of "the Matters in the Bill complained of, until Answer or "farther Order."

The Defendant, after the Injunction was obtained, took out a *Capias* on the Judgment against the Plaintiff and *Hamilton*, jointly; but the Attorney gave written Directions to the Sheriff's Officer to take *Hamilton* only; and not the Plaintiff; stating, that, as to her, there was an Injunction to restrain Proceedings. *Hamilton* being arrested on the *Capias* for £904: 12*s*., two Motions were made: one by the Plaintiff; to commit the Defendant and his Attorney, for a Breach of the Injunction: the other by the Plaintiff and *Hamilton*, that, on paying the £904: 12s. into Court *Hamilton* might be discharged.

Mr. *Hart*, in support of the Motions. The

1812.

CHAPLIN v. COOPER.

The issuing of a Writ of Execution is a Breach of an Injunction; although the Party be not actually taken under it. Upon this Principle, in the Case of *Leonard* v. *Attwell* (a), a Proceeding against the Bail was held a Breach of an Injunction. This is a much stronger Case; and in this Instance the Effect of the Suit is gone by parting with the Money.

Sir *Samuel Romilly*, and Mr. *Shadwell*, for the Defendant.

The Case of *Leonard* v. *Attwell* has no Application. This is the Case of a Bill, filed against an Obligee, to restrain Proceeding on the Bond. The Surety, who is not a Co-Plaintiff, thinks himself entitled to an Injunction, when he is not a Party to the Suit. These are, indeed, his Motions. There was no Proceeding against the Plaintiff: the Sheriff being expressly directed not to take her, in consequence of the Injunction, which had previously issued.

Mr. *Hart*, in reply.

The Case of *Leonard* v. *Attwell* is an Authority, that any indirect Step is a Breach of the Injunction. The Defendant's Intention, that the Plaintiff herself was not to be taken, is immaterial: the actual issuing of the Writ against her being a Breach of the Injunction; which was necessary by the Form of Law, to enable the Defendant to proceed against another Person. Your Lordship, if applied to, might have permitted the Defendant to proceed against *Hamilton*; but she had no Right herself to exercise that Discretion.

(a) 17 *Ves.* 385.

The

1812.
CHAPLIN
v.
COOPER.

The Lord CHANCELLOR.

Breach of Injunction by proceeding against Bail.

It is now clearly settled, that if an Injunction is obtained by a Defendant at Law, who has given Bail, a Proceeding against the Bail is a Breach of the Injunction; but within my own Memory that was not the Course: and the Bail were obliged to file a Bill themselves. The Alteration, I believe, began with Lord *Thurlow*: but, there is no instance where, upon the Notion, that if one Obligor pays by Compulsion, the other will either have to indemnify him, or to contribute finally to the Debt, it was ever held, that if one Obligor comes here alone for an Injunction, without making the other either a Co-Plaintiff or a Defendant, a Proceeding at Law against that Co-Obligor was a Breach of the Injunction.

If there is any Breach of the Injunction here, it is in respect of the Writ of Execution against this Plaintiff: but the Question is, whether substantially it is a Writ of Execution against her. When the Motion was first made, I thought it a Breach of the Injunction; conceiving that the Writ of Execution, given to the Sheriff without any Instruction, was, upon his Receipt of it, a Command of the Law to him to take the Defendant; and whether the Sheriff did, or did not, take her, it would be a Proceeding. If however a Direction was given to the Sheriff not to proceed against the Person of that Defendant, and Notice of the Injunction, restraining any Proceeding against her, that Defendant is named in the Writ *pro formâ* and *ex-necessitate*; and it is in Substance a Proceeding against the other Defendant only, and therefore not a Breach of the Injunction.

The first Motion was refused; and, upon the second it was, by Consent of the Defendant, ordered, that on

C 2 paying

1812. CHAPLIN v. COOPER.

paying the 904 : 12s. into Court, and undertaking to pay the Sheriff's Poundage within Two Days, and the Costs of both Motions, when taxed, *Hamilton* should be discharged.

ROLLS. 1812. *Nov.* 12.

WORGAN *v.* RYDER.

Though, by analogy to the Law, Costs do not follow a Decree for Dower merely, they were given upon vexatious Resistance.

THE Plaintiff, as Dowress, filed a Bill against the Defendant, as Heir, for an Account; alledging frequent Applications to him, and Refusals, on his Part, to settle. A Decree having been made in Favor of the Plaintiff, a Question arose, as to the Costs of the Suit.

Mr. *Leach*, for the Defendant, objected to Costs being allowed the Plaintiff; on the Ground, that they are not allowed at Law, and that, upon this Head, the Jurisdiction of Courts of Equity is concurrent.

Sir *Samuel Romilly*, and Mr. *Bell*, for the Plaintiff, insisted, that the Rule applied to those Instances only, where the sole Object was to obtain an Assignment of Dower. The Principle was clearly stated by Lord *Thurlow*, in *Lucas* v. *Calcraft* (*a*), and does not apply where

(*a*) 1 *Bro. C. C.* 134, cited from the following Note of Sir *Samuel Romilly*.

In Chancery.

LUCAS v. CALCRAFT.

20th *April*, 1782.

Lord CHANCELLOR.

Where a Widow comes into this Court for the single Purpose of having Dower assigned her, Costs do not follow the Suit. I have been furnished with several Precedents; but not one, in which Costs have been given on the single Point. In Bills for Dower

1812. Worgan v. Ryder.

where the Dowress has made, as she clearly had in the present Instance every Attempt to settle; and that where the Husband died seised, and the Law gives Damages for keeping the Dowress out of her Dower, the Law gives Costs; and here the Dowress is intitled against the Heir to an Allowance for Dower for the time past.

The MASTER *of the* ROLLS observed, that, as in this Case the Widow had, without any just Pretence, been vexatiously kept out of her Dower, she must have Costs.

Dower separate Questions of Title often arise, which may be conducted vexatiously, and so as to be the Subject of Costs; but Costs are not to be given, as of Course, with respect to setting out Dower only.

At Law a mere Writ of Right of Dower, or a Writ to assign Dower, carries no Costs.

1812. Nov. 13.

ANDREWS *v.* PALMER.

A MOTION was made by the Plaintiff, for the Publication of Depositions, taken *de bene esse*; on the Ground, that the Witness examined had sustained a

Depositions taken *de bene esse*, upon [illegible] the Witness, from a bodily Injury, to attend a Trial [illegible] lished; as they could not be read without Proof at the Trial [illegible] Witness was then unable to attend: but on the affidavit of the [illegible] geon as to the Probability of his Attendance an Order was [illegible] the Officer to attend at the Trial with the original Depositions, [illegible] tendered; if the Incapacity of the Witness to attend should [illegible] proved.

 section.

1812. ANDREWS v. PALMER.

serious bodily Injury, and would be perfectly incapable of attending a Trial at Law.

Mr. *Hart*, Mr. *Wilson*, and Mr. *Heald*, in support of the motion, contended, that the Publication of Depositions, taken *de bene esse*, might pass, where the witness was, from Indisposition, incapable of attending the Trial.

Sir *Samuel Romilly*, and Mr. *Wetherell*, opposed the Motion; on the Ground, that all the Applications for this Purpose were upon the Death of the Witness; but where there is only a temporary Cause, preventing the Examination, which may be removed, the Court will be extremely unwilling to order Publication. The Witness may recover, and be able to attend at the Trial.

The Lord CHANCELLOR.

I have a Recollection of some Case, where this was much considered; and I believe the Course taken was to order the Office, in whose Possession the original Deposition was, to attend with it at the Trial; and, if it was proved to the Satisfaction of the Court of Law, that the Witness was unable to travel and attend, then the original Deposition should be tendered to be read in the Court of Law. That gets rid of much Danger; as the Depositions, if published, could not be read at Law, unless it was proved to the Satisfaction of the Court, that the Witness could not be examined at the Trial (*a*). In the one Way you have the Deposition published, that ought not to be published, if that Fact should not be established: in the other you have the Benefit of it without

(*a*) See *Lutterel* v *Reynell*, 1 *Mod.* 284.

Publication

Publication; unless it should be proved, that it is necessary. This Affidavit is too loose; that the Witness will not be able to travel for a considerable Time. The Surgeon ought to have made an Affidavit with reference to the Time, when the Trial is to come on; pledging his professional Judgment to the Probability, that the Witness will not be able to attend at that Time. If the Affidavit was more precise in that respect, I think I ought to make such an order as I have mentioned.

An Affidavit was afterwards produced more precisely worded; and the Order was made accordingly.

1812.
Nov. 14. 16.

Specific Performance of a parol Agreement as to Land: the Effect of a Family Compromise of doubtful Rights; with Part performance by Possession, and Improvements; and Acquiescence near Nineteen Years: a third Person being permitted to act upon his Conception of the Rights, not questioned at the time by the Defendant; who cannot object, that he acquiesced under Expectations from that Person; which were in Part disappointed.

WILLIAM STOCKLEY, being seised under three Freehold Leases from the Earl of *Derby*; one dated 1768, of a Farm, called *Gore's Tenement*; another, dated in 1771, of a Farm, called *Stockley's*, consisting of a Messuage and several Pieces of Land, amongst which were two Meadows, called *Long Shoot* and *Rush-Hey*; and the third, dated in 1772, of Moss Lands, afterwards improved, and divided into Six Closes, called the *Moss Closes*; by his Will, dated the 3d *September*, 1782, disposed of his Property in the following Terms: "I give "and devise to my Son *Benjamin*, when he comes to the

 "Age

1812.

STOCKLEY *v.* STOCKLEY.

"Age of Twenty-one Years, all that my Messuage or "Tenement, now in the possession of *Edward Foster*, as "Farmer thereof," subject to certain Annuities; "I give "and devise to my Son *Thomas*, all that my Messuage and "Tenement, wherein I now live," subject also to certain Annuities.

The Testator died in *September*, 1782. At the Time, when he made his Will, he occupied the Farm called *Gore's Tenement*, the two Meadows called *Long-Shoot* and *Rush-Hey*, and two of the *Moss Closes*; and he resided in the house, Part of *Gore's Tenement*; the Residue of the Property comprised in the Lease of 1771, together with the Four remaining *Moss Closes*, and a House thereon, being held by *Edward Foster*.

In *January*, 1787, a Meeting took place; at which the Executors and Widow of the Testator, the Plaintiff *Thomas Stockley*, the Defendant *Benjamin Stockley*, and *Benjamin Stockley* the elder, their Grandfather, were present, in order to settle the Affairs of the Testator.

At that Meeting, *Stockley*, the Grandfather, stated to the Plaintiff and Defendant, that, as the Two Closes, called *Long-Shoot* and *Rush-Hey*, were comprised in the Lease of 1771, it would be more convenient, that the Defendant should have them; and should give, in Exchange, the Four Closes of Moss Land, demised to *Foster*; adding that he knew the latter were not so valuable as the former; but that he would make Amends to the Plaintiff; to which Proposal the Plaintiff, who was then an Infant, and the Defendant, then adult, agreed; also that during *Foster's* Lease the Defendant should pay the Plaintiff a certain Rent.

The Defendant was soon after put in Possession of the Two Closes, called *Long-Shoot* and *Rush-Hey*; and had

had ever since continued in Possession. He also paid the Rent to the Plaintiff until the Expiration of *Foster's* Lease, in *February*, 1789: when the Plaintiff was put into Possession of the Four Moss Closes, and had ever since continued in Possession of them; as also of the other Two Moss Closes, and of the Messuage and Premises called *Gore's Tenement*, comprised in the Lease of 1768: but no Conveyance had ever been executed by the Plaintiff or Defendant, either of the Four Moss Closes, or of *Long-Shoot* and *Rush-Hey*.

The Defendant having commenced an Action of Ejectment to recover the Four Closes of Moss Land, and the House thereon, the Plaintiff filed his Bill; insisting, that if any Doubt could arise on the Construction of the Will, he was entitled to an Execution of the Agreement, upon Part-performance and Acquiescence for nearly Nineteen Years, and Improvements by him; that *Stockley*, the Grandfather, had left the Defendant a Moiety of an Estate at *Burscough;* which he would not have done, in case he had suspected that the Defendant would have endeavoured to set aside the Agreement; which Estate the Defendant now enjoyed; and praying a specific Performance of the Agreement, with the consequential Directions for mutual Conveyances.

The Answer insisted, that the Testator, by the Words of his Will, bequeathed to the Plaintiff only the Messuage or Tenement, where he then lived; and that the Lands, belonging to *Stockley's*, at that Time in the Occupation of the Testator, were not included; but only such Lands, as were usually held with *Gore's Tenement*. The Defendant admitted the Meeting; but stated, that on his objecting to the Proposal, made by his Grandfather, the latter in a threatening manner said, that he would force the Defendant to be quiet; or would leave him worse; from

1812.
STOCKLEY
v.
STOCKLEY.

from which the Defendant apprehended that his Grandfather would alter his Will, by which, as the Defendant had Reason to believe, the whole of the Estate in *Burscough* was given to him; and, therefore, because he stood very much in Awe of his Grandfather, he forbore to urge his Claim any more. The Defendant denied the Agreement, and the alledged Acts of Part-performance; but admitted, that the Plaintiff had got into Possession of the Four Closes of Moss Land, and was still in Possession of them; the Defendant being restrained, by the Threats of his Grandfather, who died in 1805, from sooner asserting his Right to the Moss Closes. He farther stated, that he was under the original Will, made by his Grandfather, to have taken the whole of his Estates; and that his Grandfather, by revoking his original Will, and giving the Defendant only a Moiety of the Estates, the whole of which were at the Meeting promised to him absolutely, had deceived and disappointed him; and he therefore submitted, that he was no longer bound to acquiesce in the proposed Arrangement. The Defendant also insisted upon the Statute of Frauds (*a*) in Bar to the Relief, sought by the Bill.

The Decree made at the *Rolls* on the 27th of *June*, 1809, which, it was admitted, had not been drawn up according to the Intention of the Court, directed, that the Bill should be retained for Twelve Months, and that the Defendant should be at liberty to bring an Ejectment for the Recovery of the Property, and proceed to Trial; and, on the Trial, the Plaintiff was not to set up the Statute of Limitations; and the Injunction, which had been granted, restraining the Defendant from proceeding at Law, was continued; and all farther Directions were reserved, with liberty to apply in the Mean-time.

(*a*) Stat. 29 *Ch.* 2 c. 3.

From

From this Decree the Plaintiff appealed to the *Lord Chancellor*.

Sir *Samuel Romilly*, and Mr. *Bell*, for the Plaintiff.

This is a Bill to carry into Execution an Agreement, entered into a long Time ago; but that Agreement has been acquiesced in, from the Period, when it was entered into, until the filing of the Bill; between Eighteen and Nineteen Years. The Defendant conceives, that he is entitled to extricate himself from the Obligations, imposed upon him by the Agreement, because the Grandfather has not given him all that he expected. The Grandfather did devise to the Plaintiff and Defendant according to his Promise; and it is quite immaterial in what proportions; or what was the Value of the Estate, given to each of them.

In 1806 the Defendant for the first Time sets up a Title, not only to the Property he gave, but also to that he received in Exchange; contending, that the Devise to the Plaintiff extended only to the House, in which the Testator resided; and not, as it must be construed, to the whole Farm, occupied by him. Whatever may be the Construction that ought to be put upon the Will, the *Master of the Rolls*, if his opinion was, that the Defendant should proceed in Ejectment, should have dismissed the Bill; as it proceeds upon the Principle, that the Plaintiff here has no remedy at Law. Nothing, indeed, can be tried by this Ejectment; the legal Estate of the Four Closes being certainly in the Defendant; and the Object of this Suit to get a Conveyance from the Defendant of that legal Estate. When the Circumstances are considered, that the Agreement was entered into under the immediate Auspices of the Grandfather, who has made a Disposition of his own Property on the Faith of it; the long Acquiescence; the

1812. Stockley v. Stockley.

the Construction of the Parties, especially the Defendant, an Adult, at the Date of the Agreement: the Plaintiff is entitled to the Decree his Bill seeks; admitting that the Defendant would, at Law, be entitled to recover the Four Moss Closes. The Objection from the Statute of Frauds is answered by the Fact, that there has been a Part-performance. It is next contended, that the Agreement was made with the Plaintiff, when an Infant: but every Agreement with an Infant is not void; and the Plaintiff, when adult, acquiesced in, and confirmed this Agreement. The Defendant himself acquiesced in it, until the Death of his Grandfather; and then, as he has not got the whole of his Grandfather's Property, would disturb it: but supposing the Agreement not beneficial to him, yet, having waited until his Grandfather's Death, it would be a Fraud in the Defendant to impeach it; the Grandfather having made his Will on the Faith of it. The Agreement was a Family Arrangement; to establish the Peace of a Family; and in this respect the Case resembles *Stapilton* v. *Stapilton* (*a*). The only Difference is, that the Grandfather here held out, that he would make a Provision.

Mr. *Martin*, and Mr. *Heys*, for the Defendant.

The Closes *Long-Shoot* and *Rush-Hey* were not demised by those Names: nor mentioned by those Names in the Will. This Agreement was intended as an Exchange; which is not immaterial; since, if the Plaintiff was ejected from the Closes he received in Exchange, he would be entitled to recover those he gave. One of the Grounds, on which the Plaintiff's Claim to a specific Performance rest, is, that the Defendant takes an Advantage under his Grandfather's Will. That is not in Proof; neither does any Thing appear on the Face of the Will to cor-

(*a*) 1 *Atk.* 2.

roborate

roborate the Assertion. This, therefore, is not an Agreement, specifically to be performed. As all the Six Closes either descended to the Defendant, as eldest Son and Heir, or passed to him as Devisee, there was no Consideration for the Agreement. If the Grandfather proposed an Exchange, under a Misapprehension of the Parties' Rights, what Equity has the Plaintiff? The first question, therefore, is, whether any Consideration ever passed to the Defendant; which might be successfully contended, if the legal Estate of the Two Closes passed to the Plaintiff. The next Question is, whether this was an Agreement, entered into by Parties, cognizant of their Rights: such an Agreement as this Court ought to perform. The Case of *Stapilton* v. *Stapilton* differs from the present. That was the Case of an actual Conveyance of the Estate; a voluntary Settlement; where all the Parties were apprised of their Rights. If these Parties had subsequently executed a Deed, the Defendant could have no Relief. The Proposal and Representation came from the Grandfather. It would have been different, if the Proposal had come from the Defendant himself.

Sir *Samuel Romilly*, in Reply.

The Defendant says, that he did not enter into the Agreement; but that he was silent and forbore to urge his Claim. If the Two Closes did not pass by the Devise to the Plaintiff, but descended to the Defendant as Heir, yet the Agreement is binding upon him. There is no Pretence for alledging, that the Defendant was ignorant of his Rights. The Answer admits, that he was aware of them; but says he was induced to accede by his Expectations from his Grandfather. The Plaintiff, acting on the Faith of the Agreement, has improved the Property in his Possession; a Fact admitted by the Answer. The Grandfather actually made a Provision on the Faith of the Agreement: the

1812.

STOCKLEY v. STOCKLEY.

the Court, therefore, will not disturb it, under all these Circumstances. Whether the Grandfather left to the Defendant the particular Estate, which he promised, is immaterial. It is sufficient, that the Defendant took that Promise as the Consideration; and whether it was realised, or not, is of no Consequence. His Expectation being disappointed, he cannot resort to his original Right. With regard to the Defendant's Character, as Heir, an Heir stands in the same Situation with a Stranger, as to Election.

The Lord CHANCELLOR.

Nov. 16.

Family Compromise favored; if reasonable, and upon a doubtful Right; even in the strongest Case; as where one Party was drunk at the Time. Whether upon a mere Supposition of Right, proving erroneous, *Quære.*

If this Cause can be determined, assuming, that these Two Closes did not pass by the Will to the Plaintiff, but that a Court of Equity ought to determine them to be his, the Expence of a Trial at Law must be regretted. It is true, in Family Arrangements this Court has administered an Equity, which is not applied to Agreements generally. One very strong Instance is the Case of *Pullen* v. *Ready* (*a*); where Legacies were given; to be forfeited by Marriage without Consent: one of the Legates did marry without Consent; a Family Arrangement took place; giving that Legatee the Benefit of the Legacy. That Arrangement, it was suggested, was under a Mistake of the Law; that the Condition was only *in terrorem*; which under the Circumstances it was not; and it was contended, that the Parties were not bound: but Lord *Hardwicke* said, there was the Will before them, and if they chose to construe it, taking upon themselves the Knowledge of the Law, he would hold them bound. That Case, with the Passage in *Cory* v. *Cory* (*b*), which is certainly

(*a*) 2 *Atk.* 587. (*b*) 1 *Ves.* 19.

very

very strong, that an Agreement to settle Disputes in a Family, and a reasonable Agreement, should be inforced against a Party, who was drunk at the Time, and *Stapilton* v. *Stapilton* (*a*), which, with all the able Reasoning in it, is also an extremely strong Case, lead me to the Opinion, that in these Family arrangements the Court does not quite go the Length of denying Relief upon the Principle, that prevails between Strangers.

I had a Doubt, whether what is in *Stapilton* v. *Stapilton* (*b*), represented as falling from Lord *Macclesfield*, in *Cann* v. *Cann* (*c*), could have been his Language. If a Doubt is raised between Parties as to their Rights, and, adverting to that Doubt, they come to an Agreement, and that is a reasonable Agreement, in Family Matters the Court goes a long Way to carry it into Execution: but my Difficulty was, that there might be a Supposition of Right, without a Doubt upon it; that it would be too much to execute an Agreement, entered into upon such Supposition; if unfounded; and the Words of Lord *Macclesfield*, instead of "a Supposition of Right," might have been, "a doubtful "Right:" but I observe in a Manuscript Note, that I have, the same Words are represented as those of Lord *Macclesfield*.

I should be sorry to decide this upon a View of the Case, that was not much pressed at the *Rolls*. The Decree is admitted not to be drawn up, as the *Master of the Rolls* intended; and must therefore be altered: but I do not hesitate to express a strong Opinion, that the Defendant was bound under the Circumstances. This Family Meeting taking place after the Testator's Death, it is impossible to deny, that there was a fair Question, whether the

(*a*) 1 *Atk.* 2.
(*b*) See 1 *Atk.* 10.
(*c*) See 1 *P. Will.* 723.

Two

1812.
STOCKLEY
v.
STOCKLEY.

Two Closes did, or did not, pass under the Description of "the Messuage or Tenement in the Possession of *Foster*;" also, whether they passed according to the Intention of the Testator. It appears, at least, at that Conversation, that a third Person, to whom both these Parties profess to pay Attention, must have taken for granted, that *Thomas* was entitled to these Two Closes; that such a belief was generated in the Mind of that third Person; as he says, "*Benjamin* shall have that, which *Thomas* gives up: and "*Thomas* shall have that, which *Benjamin* gives up." That is an Assertion by a third Person, speaking of the Interests of the Two others, importing what he thought, at least. If then he makes that Statement, and *Benjamin* admits, that at that Moment his Conception was quite otherwise, and that *Thomas* was not entitled under the Devise, there are Cases in Equity of a third Person dealing about the Interests of Two Persons, as to whom he interposes; asserting their Interests to be, as he describes them; and another Person, who, conceiving them to be otherwise, remains silent.

It is clear also, that the Grandfather intimated to both Parties this, at least; that with regard to this Arrangement, proposed by him, and understood by him to be acceded to, he meant to make some Disposition of his own Property; observing, that *Thomas* would have the worst of it: but he (the Grandfather) could set that right by his own Property. He is permitted, therefore, to act upon the Supposition, that an Agreement had taken place, with regard to which he was to do something. Suppose then *Thomas* entitled to those Two Closes; and the Grandfather had given him nothing: could *Thomas*, after the Lapse of Nineteen Years say, that he had acquiesced under the Expectation of the Grandfather's making up to him that Difference; and desire, as he had been disappointed in that Expectation, to be discharged? He would have great

difficulty

Difficulty in maintaining that. *Benjamin* on the other Hand by his Answer says, the Grandfather promised to give him the *Burscough* Estate; and as he acted under the Expectation of receiving a greater Bounty than has been given to him, therefore he shall take that Half of the Estate which is given to him; and shall take back his own Estate also. It would be very difficult for him to establish that Claim.

Upon Two Grounds therefore I have a strong Opinion, that the Defendant is bound: 1st, that enough was before them to induce a Doubt upon the Question as to the legal Operation of the Will: 2dly, the actual Intention; and if they had a Right to determine by Compromise, with regard, not only to the legal Effect of the Will, but the actual Intention, there is enough of that to support the Agreement: but, if not, yet under the Effect of what passed in the Grandfather's Presence, and must have had an Effect upon his Intention through his Life, and what appears from the Conduct of the Defendant to have been his Conception of the Grandfather's Intention during his whole Life, there is enough to bind him.

The Decree was made according to the Prayer of the Bill.

1812.
Nov. 13. 18.

FREEMAN, *Ex parte.*

Commission of Bankruptcy not superseded able under the General Order, (26th *June*, 1793) where, due Diligence being used, the Adjudication was prevented by keeping Evidence out of the Way. A Writ of *Supersedeas* and a new Commission being obtained without disclosing. that an Attendance had been ordered upon a Petition to compel the Attendance of Witnesses under the first Commission, the Writ was quashed, and the second Commission superseded.

No second Commission of Bankruptcy to be sent to the *Lord Chancellor* without a note of what has passed in the first.

THE Petition stated, that on the 25th of *September*, 1812, a Commission of Bankruptcy issued against *Davis* and *Lloyd;* and on the 30th the Commissioners met, at *Melksham*, for the Purpose of opening the Commission; when Evidence was given of the petitioning Creditor's Debt, and the Trading; and an Act of Bankruptcy was proved against *Davis;* but *Lloyd*, having obtained Information of the Commission, removed out of the Way, and concealed, Two Persons of the Names of *Stratten* and *Osman;* who were capable of proving an Act of Bankruptcy on his Part. The Commissioners, not being attended by either of those Persons, adjourned their Meeting until the 8th of *October;* to give a farther Opportunity of proving an Act of Bankruptcy against *Lloyd* The Commissioners' Summons was served on the 6th of *October* upon *Stratten*, requiring his Attendance on the 8th; which he did not obey; but wrote to his Friends; acknowledging his Determination not to appear as evidence against *Lloyd*; admitting his Concealment to be with that View expressly; and requesting the Answers to his Letters to be sent to *Lloyd.* Of *Osman's* Place of Residence no Trace could be discovered. In consequence no Act of Bankruptcy could be proved against *Lloyd.* On the 8th of *October* the Commissioners farther adjourned their Meeting, in order that a Petition might be presented to the Great Seal to compel the Attendance of *Stratten* and *Osman;* and to enlarge the Time for opening and proceeding in the Commission. On the 13th of *October* an Application was made for a Special Order to enlarge the Time for opening the Commission: but the Agent was informed, that such Application was unusual.

The

1812.

FREEMAN, *Ex parte.*

The Petition was presented; and was on the 16th of *October* answered for the next day of Petitions; and Copies were served on *Lloyd* and *Stratten.* *Osman* and *Stratten* continuing to absent themselves, and no Act of Bankruptcy being proved against *Lloyd,* the Bankruptcy had not appeared in the *Gazette,* when the Twenty-eight Days, under the General Order (*a*), expired, on *Friday,* the 23d of *October:* but Notice was given at the Bankrupt Office of the Intention to proceed in the Commission without Delay; when the Attendance of the Witnesses could be obtained under the *Lord Chancellor's* Order; with the Commissioner's Certificate of the Facts.

The Solicitor to the Commission, finding on *Monday* the 26th of *October,* that another Docket was struck against *Davis* and *Lloyd,* entered a Caveat; and served the Solicitor, who struck that Docket, with a Copy of the Petition, presented and answered; giving him Notice, that an Application would be made to the Great Seal on the 31st of *October* to hear that Petition; and, that the Commission, already taken out, would be proceeded in, as soon as the Attendance of *Stratten* and *Osman* could be obtained under the *Lord Chancellor's* Order. On the same Day the Solicitor, who struck the second Docket, gave Notice to the Solicitor under the existing Commission, that a Docket was struck; and that a Commission of Bankruptcy had been accordingly prepared by the Secretary of Bankrupts; and would that Evening be forwarded to the *Lord Chancellor.*

On the 28th of *October* the Commissioners, finding, that *Stratten* could not be prevailed upon to attend them, notwithstanding he was within Three Miles of the Place of Meeting, and a Chaise had been sent for the Purpose

(*a*) 26th *June,* 1793. 2 *Cooke's* Bank. Law, 372.

of

1812.

FREEMAN, *Ex parte.*

of conveying him, proceeded to take the Evidence of another person, *Ann Davis*; and upon that Evidence declared both *Davis* and *Lloyd* Bankrupts. A Copy of that Declaration was forwarded to Town; to be inserted in the *Gazette*: but, when the Agent applied at the Bankrupt Office, the necessary Signature was refused; on the Ground, that a Writ of *Supersedeas* and a new Commission had been sealed. On the Evening of the 26th of *October* a special Messenger was sent to the *Lord Chancellor,* then in *Dorsetshire*; and on the 28th of *October* an Order was made to supersede the first Commission, and for the issuing of the second Commission; the Circumstances not being disclosed to his Lordship.

This Petition, alledging, that *Lloyd* had kept back the Witnesses to prove the Bankruptcy against him under the first Commission, in order to prevent its been opened within the Time, required by the General Order, and that another Commission might be executed in *London,* in the Vicinity of his immediate Friends, and conducted by his own Solicitor; that the Principal Creditor and principal Part of the Partnership Property were in the Neighbourhood of *Melksham*; that the first Commission was proceeded in as far as under the Circumstances it could be; and was intended to be prosecuted without Delay, as soon as the Attendance of the Witnesses could be compelled; prayed, that the Writ of *Supersedeas* may be quashed; and a Writ of *Procedendo* may issue upon the first Commission; and that the second Commission may be superseded.

Sir *Samuel Romilly,* and Mr. *Wray,* for the Petitioners.

There has been no Neglect whatever on the Part of those taking out the first Commission. This application falls, therefore, immediately within the Case *Ex parte Ellis*;

1812
FREEMAN, *Ex parte.*

Ellis (*a*); where your Lordship held, that a Declaration in the *Gazette* was not in every Instance necessary under Lord *Loughborough's* Order. Where a Party has Notice of the Intention to proceed in the first Commission, he shall not avail himself of the Circumstance, that it has not been inserted in the *Gazette*. The Spirit of the Order has been complied with: and your Lordship will determine on the Circumstances; as in *Ex parte Leicester*, *Ex parte Layton* and *Hardwicke* (*b*), and *Ex parte Sanden* (*c*). This Point seems to have been decided in a Case, cited at the Bar in the Argument of *Ex parte Leicester*. What is the Meaning of the Words "Want of "Prosecution" in the General Order? Do they import all possible Diligence and Exertion?

Mr. *Leach*, and Mr. *Heald*, against the Petition.

The second Commission issued conformably to Lord *Rosslyn's* General Order, which gives an absolute Right to sue it out after the Expiration of the Twenty-eight Days; and there is no principle, upon which an innocent Party can be deprived of the Advantage he has so obtained. What Means had the Solicitor, suing out this second Commission, of trying the Truth of the Assertions, contained in the Notice, given to him? Those Assertions might be a mere Instrument of Delay. Can the mere Circumstance of presenting a Petition repeal the General Order? The Case *Ex parte Ellis* has no Application. There was an effectual Prosecution of the first Commission; and the Advertisement in the *Gazette* was there physically impossible. In *Ex parte Sanden* the Creditor was acting in the Breach of his own Engagement. The Circumstances of the Case, cited in the Argument of *Ex parte Leicester*, do not appear: but it seems to have

(*a*) 7 *Ves.* 135.
(*b*) 6 *Ves.* 429. 434.
(*c*) *Rose's* Ba. Ca. 85.

 turned

1812.
FREEMAN,
Ex parte.

turned solely upon this: that the Order merely was obtained; but the Writ of *Supersedeas* was not actually sealed.

The Lord CHANCELLOR.

Nov. 18.

Under the first of these Commissions a Meeting took place within Five Days for the Purpose of prosecuting that Commission; and was adjourned on the Ground, that the Attendance of these Witnesses could not be procured; and upon a Petition to me I made an Order for the Hearing of that Petition; which in consequence of the Season of the Year, when that Order was made, could not possibly take place before the Expiration of the Twenty-eight Days under the General Order. As far therefore as that can be considered the deliberate Act of the *Lord Chancellor*, it amounts to this; that particular Circumstances would take a Case out of the General Order; and there is no Doubt, that, if this Court had been then sitting, or if I had been in Town, or at a Distance, which admitted easy Access to me, I should have made an Order for an almost immediate Attendance; with the View to give Effect to the clear Purpose *bonâ fide* to execute that Commission.

Particular Circumstances would take a Case out of the General Order, 26th *June*, 1793.

Upon the Affidavits more Diligence could not have been applied for that Purpose after the Discovery, that *Ann Davis* could prove an Act of Bankruptcy by *Lloyd*. Her Deposition proves unquestionably one or more Acts of Bankruptcy. That therefore would have been within the Authorities a Proceeding; if the Writ of *Supersedeas*, and the second Commission, had not been previously sealed. From Recollection of the Time of the Day, when I ordered the Seal to be put to that Writ and Commission, it was previous to the Declaration of Bankruptcy upon that Evidence; and though I do not apprehend,

Proof of an Act of Bankruptcy, &c. warranting the Adjudication, a sufficient Proceeding within the General Order (26th *June*, 1793); preventing a *Supersedeas*.

prehend, that Instruments are considered as sealed, for the Purpose of proceeding on them, while remaining in the *Lord Chancellor's* Hands, I must consider these Instruments as sealed from the Moment when they were delivered to the Messenger, who called for them; which is the strongest Way I can put it for those, who support the second Commission.

1812.
FREEMAN, *Ex parte.*
Instruments not considered as sealed, for the Purpose of proceeding on them, while remaining in the *Lord Chancellor's* Hands; but are so considered from the Moment of Delivery to the Party.
Writ of *Supersedeas* and second Commission of Bankruptcy considered as sealed from Delivery to the Messenger.

Had I recollected, that upon the 16th of *October* I had actually ordered an Attendance upon a Petition, stating the Reason, why the first Commission was not effectually prosecuted, and praying a Hearing upon a Day, evidently on Calculation long subsequent to the Expiration of the Twenty-eight Days, I should have considered, whether, attending to the true Meaning of the General Order I should have made that Order of Attendance; and, if my Opinion had continued, that the Order was right under the Circumstances, and that I should, if in Town, have ordered an immediate Attendance, with the View of giving Effect to the Prosecution of a Commission, intended to be prosecuted, I should not have put the Seal to the Writ of *Supersedeas* and the new Commission: or, if it had appeared to me, that my Order ought to have no Effect, I should have accompanied the sealing of the second Commission with an Intimation to the Bankrupt Office, that the Order issued by Mistake, and the second Commission ought to stand. I had however, and it is not surprising, no Recollection of the Circumstance, that I had made the Order in that Case; and received no Intimation to that Effect.

The Notice to the Commissioners, acting under the second Commission, of course could have no Effect. It is clear, that after a Writ of *Supersedeas*, and a second Commission, actually issued, those Commissioners were bound to proceed; and no Notice ought to stay their Hands.

1812.
FREEMAN, *Ex parte.*

Hands. As to the rest of the Case, upon these Affidavits the Fact is clear, that *Stratten* could have proved an Act of Bankruptcy; and that, whether by concert with *Lloyd*, or not, under whatever Influence or Feeling, he himself states, that he was determined to keep out of the Way of giving any Testimony, that could affect *Lloyd*. It is impossible also upon this Statement not to conclude *Lloyd's* Object to have been, that this Commission in the Country should not proceed. He defends that, as a proper Object; as the Commission would be better executed in *London*; and it is extremely difficult upon these Affidavits to say, that *Lloyd*, at least, did not know, that a Proceeding was actually had under his Bankruptcy; if those, who have taken out the second Commission, did not know that.

Taking the Delivery of the Writ of *Supersedeas* and Commission to the Messenger to be a Delivery to the Party, though they remained in the Bankrupt Office until after the Declaration of Bankruptcy under the first Commission, the Question has been argued as to the Right under such Circumstances to have a second Commission: a Right, dispensing (for so it must be put in this Case) with all intermediate Proceeding by the *Lord Chancellor* himself within the Twenty-eight Days; and avoiding the Effect of all such judicial Proceeding. The Questions, whether notwithstanding any intermediate, judicial, Act of the *Lord Chancellor* the issuing the *Supersedeas* and new Commission shall fix the Party with Costs, and whether it is *ipso facto* equivalent to superseding the first Commission, the Party having a Right so to consider it, are perfectly distinct. None of the Bankrupt Statutes give any Direction as to superseding Commissions except in the Instance of the Creditor, privately receiving Part of his

The only *Supersedeas* of a Bankruptcy by Statute is in the Instance of the Creditor, privately receiving Part of his Debt; giving the Right; and leaving no Discretion in the *Lord Chancellor;* who in all other Cases, considering the Commission as an Action and Execution in the first Instance, exercises the same discretionary Power over that Species of Execution, as other Courts.

Debt;

Debt; in which Case it is expressly declared (*a*), that the Commission shall and may be superseded; giving the Right to the Party; and leaving no Discretion in the *Lord Chancellor*. As to all other Cases, the Court is in the Habit of considering a Commission of Bankruptcy as, what it is frequently called, a Species of Execution; an Action and Execution in the first Instance; and over that Species of Execution this Court has conceived itself to have the same discretionary Power as other Courts have by interposing to prevent an unlawful Use of the Law.

Fraud inferred from not proceeding with a Commission of Bankruptcy for Six Months.

Order, compelling the Attendance of Witnesses upon opening a Commission of Bankruptcy; to prove some specific Fact: not upon loose Speculation.

This Jurisdiction was very early, and very properly, exercised in a Case, where the Court inferred Fraud from not proceeding with a Commission for Six Months: *Ex-parte Puleston* (*b*). If this Creditor had been speculating loosely upon the possible Proof, that might be made some way or other, by some Person or other, who might be found, I should not have thought this like those Cases where I have ordered Persons to attend the Commissioners; to prove some specific Fact (*c*); for Instance, a Witness to the Execution of a Deed: but there is no Doubt, that these Persons would have been able to prove an Act of Bankruptcy. There is no Suggestion, that they could not: on the contrary there is a Confession, that they kept out of the Way on Purpose.

Distinction between a Commission of Bankruptcy supersedeable and superseded.

Discretion of the *Lord Chancellor* in the former Case; with reference to the Object: to prevent Fraud.

Up to the Year 1793 we may collect from this General Order, that, if Eight *Gazettes* had been published, after a Commission issued, without any Proceeding, it was supersedable. I say, it was supersedable; having laid down, upon Grounds, that still appear to be satisfactory, that there is a great Distinction between a Commission super-

(*a*) Stat. 5 *Geo.* 2. c. 30. s. 24.

(*b*) 2 *P. Will.* 545.

(*c*) *Ex parte Higgins*, 11 *Ves.* 8.

sedable

1812.
FREEMAN, *Ex parte.*

sedable and one, as to which it is declared, that it shall and may be superseded. Up to the Date of this General Order the Rule was one as imperative as that, which has since prevailed: but it was not a Rule, that left no Opening to the Exercise of the *Lord Chancellor's* Discretion; and, if it had, it would have been a most unwholesome Rule. It was a Rule of Practice, laid down for the Purpose of preventing Fraud in the Administration of Bankruptcy by not proceeding in the Execution of Commissions; and can a Rule, established with such an Object, be converted into a Protection to Fraud, by preventing the Execution of a Commission, intended *bonâ fide* to be executed according to the Exigencies of the Law?

This General Order applies to the Case of a Solicitor, who could not execute the Commission for a given Time; and found it necessary to take out another Commission upon the Petition of some other Creditor; leaving it quite open to the *Lord Chancellor's* Discretion to issue a *Supersedeas* or not; as one *Lord Chancellor* could not lay down a Rule to compel his Successors to issue it. A Commission may be supersedable; but cannot be superseded without a Petition, and the Writ issuing; and this is Notice, that in the Petition it is not necessary to state more than, coupling the Words of the Order with the Affidavit, that it does not appear from the *Gazettes*, that the Party has been adjudged a Bankrupt within the Time; and that is *primâ facie* Evidence, upon which the *Supersedeas* will be granted. The Order ascertains clearly the Priority between a Solicitor, suing out a second Commission, and the Solicitor, who, having sued out

Commission of Bankruptcy, supersedeable under the General Order, (26th *June*, 1793) not superseded without Petition, and the Writ issuing; which is subject to the *Lord Chancellor's* Discretion; but Affidavit, that it does not appear from the *Gazettes*, that the Party has been adjudged a Bankrupt within the Time, is sufficient *primâ facie* Evidence.

Priority of a different Solicitor for another Commission.

the

the first, desires, not to prosecute that Commission, but to sue out another upon the Debt of some other Creditor. It is evidence of the Inclination of the Court to hold him to the strongest Proof of his Purpose *bonâ fide* to prosecute the first Commission: but whether it was, or was not, to be prosecuted, can be collected by Inference only. This Order has not determined that Question any more than the other Orders; which have not according to my Recollection of them gone the Length of prescribing, that the first Commission shall not, even if it ought, to proceed.

1812.
FREEMAN, *Ex parte.*
To prevent a *Supersedeas* under the General Order in Bankruptcy, (26th *June*, 1793) the strongest Proof required of the Purpose *bonâ fide* to prosecute the Commission; prevented by Accident, Illness, Adjudication too late for the *Gazette*, &c.

In *Ex parte Leicester*, and *Layton* and *Hardwicke* (a), this Subject was considerably discussed with reference to many Cases, that may be put, in which this Interpretation of the Order, that in no Circumstances whatever you shall be at Liberty to shew Prosecution of the Commission, as far as can be, and nothing except Adjudication and the Advertisement in the *Gazette*, is a Prosecution, would be most unwholesome. Suppose Sickness of a Commissioner, or a Witness: a Witness, coming to give Evidence, prevented by Accident; that the Commissioners had, as in *Ex parte Leicester*, gone the Length of Adjudication; but it had not got into the *Gazette*. I have still the Opinion I held in those Cases and *Ex parte Ellis* (b); that, notwithstanding the second Commission, that Circumstance being accounted for, and enough appearing to satisfy the Meaning of these Words "for Want "of Prosecution," the first Commission might stand; and that Lord *Rosslyn* could not have intended, that there could be no Exception; even of Cases, which it was the very Purpose, and Policy, and Meaning, of that Order to protect; and in one of those Cases Sir *Arthur Piggott* has well stated, upon antecedent Authorities, that these General Orders were never intended to exclude the Con-

(a) 6 *Ves.* 429. 434. (b) 7 *Ves.* 135.

sideration

1812. Freeman, *Ex parte.*

sideration of Cases, where the Purpose was defeated, not by an Intention to abandon it, but by Means, adopted to make an honest Intention to prosecute it ineffectual.

It is proved, that there are a Debt, a Trading, and an Act of Bankruptcy, that will sustain this Commission. It is not denied, that there are Witnesses, who could prove various Acts of Bankruptcy by *Lloyd*. Was the Party not prosecuting the Commission with Fidelity, when, knowing, there were Two Witnesses, who could prove Acts of Bankruptcy, he had not found out a Maid-servant; whom he afterwards discovered by Accident; and within Forty-eight Hours produced before the Commissioners at *Melksham*; and by her Evidence, within an Hour or Two after the new Commission issued, proved an Act of Bankruptcy: the other Witness acknowledging, that he kept out of the Way for the Purpose of avoiding giving Evidence against his old Master: Conduct, certainly not to be justified; though proceeding from an excuseable Feeling?

Under these Circumstances upon the Authorities my Opinion is, that the first Commission must proceed; and the second must be superseded.

The *Lord Chancellor* on a subsequent Day said, he had given Directions, that in future a second Commission should not be sent to him without a Note of what had been done in the first Commission.

GARDNER,

1812.
Nov. 17.

GARDNER, *Ex parte.*

Petition to supersede a Commission of Bankruptcy, and stay the Certificate, dismissed for want of Proof of Collusion; but, in a suspicious Case, without Costs.

Proprietor of a Quarry, getting the Stone for Sale, is not a Trader within the Bankrupt Laws; and the Effect of Purchases of Stone must depend upon the Circumstances.

Act of Bankruptcy by leaving his House to avoid a Creditor, without Collusion, compleat the Instant of Departure; and therefore not affected by subsequent Residence with the petitioning Creditor.

Commission, concerted with the Bankrupt, cannot stand: but, that the Object is to defeat an Execution, is no Objection.

No Inference of Fraud from Debts proved by Relations.

Authority of the Commissioners and the *Lord Chancellor* over the Certificate confined to Conduct under the Commission: not like the general Discretion of Creditors to sign or refuse.

THE Petition prayed, that a Commission of Bankruptcy might be superseded, at the Expence of the petitioning Creditor; and the Certificate, in the mean Time, be stayed; and, in case the Commission should not be superseded, that the Petitioner might prove, and the Certificate, in the mean Time, be stayed.

The Petition stated, that in *February* 1812, the Petitioner and the Bankrupt entered into Partnership together, as Stone-delvers; the Petitioner making Cash Advances; and in *May* following he gave Notice to determine the Partnership; brought an Action against the Bankrupt; and obtained an Interlocutory Judgment, in respect of what was due to him for his Advances: alledging Collusion between the Bankrupt and the petitioning Creditor in taking out the Commission, in order to defeat the Execution: that there was no good petitioning Creditor's Debt; that the Bankrupt was not a Trader; his only Occupation being that of delving or cutting Stones from Quarries on his own Estate, and selling them to Stone-merchants; that there was no Act of Bankruptcy; that the whole, or the greater Part of the Debts, proved under the Commission, were Debts proved

by

1812. GARDNER, *Ex parte.*

by the Bankrupts' Relations and Friends; and that the Certificate was signed by the Creditors on the Day the Bankrupt passed his last Examination.

The Affidavits were very contradictory: that of the Bankrupt stating, that he had for many Years been a regular Trader in buying Stones of all Sorts, after they had been taken from the Quarry, and selling them, besides his Occupation of delving; and the Affidavit of a Stone Merchant stated, that he had purchased from the Bankrupt Stones, not produced at his Stone Quarries. The Affidavits in support of the Petition, one of which was filed, since the Petition was presented, denied, that the Bankrupt had dealt in any other Way than it stated.

Mr. *Leach*, and Mr. *Cullen*, in support of the Petition.

A Person, getting Stone in his own Estate for Sale, is not a Trader within the Bankrupt Laws; and if occasionally, by Accident, or for any particular Purpose, he purchased Stone, those occasional Acts would not make him a Trader.

It is true, one of these Affidavits was filed, since the Petition was presented: but, this is a Petition, not merely to stay the Certificate, but also to supersede the Commission; and therefore not within the general Rule (*a*).

The Bankrupt's Certificate being signed on the Day of the last Examination, consistently with your Lordship's Order (*b*) the Hour of the Day ought to appear.

(*a*) Lord *Rosslyn's* Order of 12th *April*, 1796, in 2 *Co. Ba. La.* 292. *Ex parte the Royal Bank of Scotland, Ante*, p. 5.

(*b*) 8th *August*, 1809. 2 *Co. Ba. La.* 296. 16 *Ves.* 318.

Sir

Sir *Samuel Romilly*, and Mr. *Newland*, for the Assignees.

The Distinction cannot be maintained, that, where a Petition to stay a Certificate, happens to pray a *Supersedeas*, it does not fall within Lord *Rosslyn's* Order. That Order would be useless; if it is to be departed from on such a Ground. Another Objection to this Affidavit is, that it is made by a Person, who has proved a Debt under the Commission; and, therefore, cannot dispute it.

Mr. *Leach*, in reply.

Lord *Rosslyn's* Order was founded on the Fact, that Petitions, presented solely to stay Certificates, generally proceed from vindictive Motives. It does not apply, where that is, as in this Instance, only a secondary, collateral Object. The other Objection might avail, if the Affidavit was made by the Petitioner: but it cannot invalidate his Affidavit in support of the Petition of another Person.

The Lord CHANCELLOR.

This Petition represents, on the Part of the Petitioner, the Conduct he experienced from the Bankrupt between *February* and *June*, 1812; and, taking those Representations to be substantiated, I am not surprised, that the Petitioner should be indignant. I repeat, that I apprehend the Duty I have to discharge as *Chancellor*, is dryly this: if the Bankrupt has conformed himself, I have no Right to refuse him his Certificate. On the other Hand, the Legislature has left it to the Discretion of the Creditors, whether they will, or not, sign his Certificate. If, in the Exercise of the Power, with which they are invested, they sign the Certificate, the Commissioners have no Duty; but

to

1812.

GARDNER, *Ex parte.*

to see, that the Bankrupt has conformed to the Statutes: but that Duty is confined to his Conduct, since he became Bankrupt. I put it on the dry Question, whether I can with-hold the Certificate; and disclaim all Authority to with-hold it on antecedent Conduct. I state this, with a Desire, that it should be generally understood: as it is supposed, that I have such Authority.

I have no Hesitation in saying, that, if a Commission is satisfactorily proved to be the Commission of the Bankrupt, I will not suffer it to stand: but it is no Ground whatever to affect a Commission of Bankruptcy, that it is taken out by other Creditors, in order to defeat an Execution (*a*); and to give to all the Creditors an equal and rateable Proportion of the Estate and Effects. This also it is necessary to repeat; as such Petitions are daily presented.

With respect to the Bankrupt's selling the Stones from his own Quarry, it is clear that could not make him liable to the Bankrupt Laws. Whether indeed, his purchasing Stones could make him a Trader, must depend on the Circumstances (*b*). This Petition does not state, that the Bankrupt's Relations were not Creditors; but that the Debts proved are the Debts of his Relations; that, if Creditors, they are Relations. On what Ground am I to say, that they are to be excluded? To whom is a Man in distress so likely to apply as to his Relations for that Assistance he wants? I am clearly of Opinion, that there is not in this Petition Allegation enough to require me to consider, whether, or not, these Debts of the Family Creditors are good; even supposing, that they had not been strictly looked into by the Commissioners.

(*a*) *Ex parte Arrowsmith*, 14 *Ves.* 209.

(*b*) 14 *Ves.* 603.

With

1812. GARDNER. *Ex parte.*

With respect to the Act of Bankruptcy, the Bankrupt actually leaves his own House for the Purpose of avoiding his Creditors; the Moment he left his House the Act of Bankruptcy was compleat; and, unless I have Evidence, that he took that Step in Collusion with the petitioning Creditor, the Circumstance, that he remained several Days at that Creditor's House, would make no Difference; as it cannot affect an Act, compleat in itself the Moment the Bankrupt quitted his own Residence. I have before me no Proof of Collusion, that will enable me to grant this Petition; at the same Time there is sufficient Suspicion about the Case to induce me not to give Costs (a).

The Petition was dismissed without Costs.

(a) *Ex parte The Royal Bank of Scotland, Ante*, p. 7.

1812. *Nov.* 28.

WOOD *v.* DOWNES.

After the usual Decree for an Account, Order on Motion to pay into Court the Amount of the principal Sums, admitted to be due by Examination upon Interrogatories: not extended to Interest.

A DECREE having been made, with the usual Reference to the Master to take an Account of the Principal and Interest due from the Defendant Interrogatories were exhibited for his Examination; in his Answer to which he set forth the specific Sums he had paid and received: but he omitted to cast them up, or strike the Balance. Upon an Affidavit of the Plaintiff's Solicitor, stating, that he had struck the Balance, which amounted to £8540 for Principal; and had computed the Interest thereon, which, added to the above, made the whole Sum due, from the Defendant to Plaintiff, upwards of £11,000, a Motion was made on the Part of the Plaintiff, that the latter Sum should be paid into Court.

1812.
WOOD.
v.
DOWNES.

Mr. *Hart*, and Mr. *Wetherell*, in support of the Motion.

It is not disputed, that it is the Master's Province to compute the Interest: but, pending the Report, this Court is in the Habit, when the Fact is perfectly clear, to order it to be paid. This was very recently done in the Case of *Fairly* v. *Freeman*; where the principal Sum of £2000, admitted by his Answer to be in the Defendant's Hands, was ordered to be paid into Court, together with Interest.

Mr. *Bell*, for the Defendant.

The Defendant does not object to pay in the £8540, the Principal; but there is no instance in which the Court has gone the Length now asked for, as to Interest. The Case of *Fairly* v. *Freeman* does not apply: turning on the Circumstances of gross Misconduct on the Part of the Defendant; and that Case has occasioned such Doubt, that most probably the Court will be asked to review its Decision.

The Lord CHANCELLOR.

Order on Motion to pay into Court a principal Sum, with Interest; admitted by the Answer to have been made to a greater Amount.

I certainly do not recollect any Instance, in which the Court has gone this Length upon Motion merely. In the Case of *Fairly* v. *Freeman* I went on a different Ground: taking the Ancwer to be, that the Defendant had received the £2000, and admitting, that he had made Interest to a greater Amount than I directed him to pay. I am very unwilling to carry the Practice farther than it has been carried.

The Order was accordingly made for the Defendant to pay in the £8540 only.

DUFRENE.

LINCOLN'S INN HALL.
1812.
Dec. 5, 6.

DUFRENE, *Ex parte.*

Commission of Bankruptcy supported by an Act of Bankruptcy, compleated before the Commission issued, but not, when the Docket was struck: viz. Imprisonment for Debt; the Two Months expiring in the Interval: the Affidavit being only to Belief of Bankruptcy generally; not to a particular Act.

UPON this Petition, to supersede a Commission of Bankruptcy, a Question arose as to the Act of Bankruptcy; which was lying in Prison Two Months. The Docket was struck Two Days short of the Two Months: but the Time expired, before the Commission issued. The Objection was, that the Act of Bankruptcy must be compleat at the Time of striking the Docket.

Mr. *Cullen*, in support of the Petition.

Gordon v. *Wilkinson* (*a*) is decisive upon this Point which was discussed in *Wydown*'s Case (*b*): but cannot be considered as there decided. Your Lordship, speaking of the Affidavit, only adverted to a particular Statute (*c*): but there are other Statutes, which require the Affidavit to state, that the Person was a Bankrupt at the Time the Affidavit is made. The Statute of *Elizabeth* (*d*) is of that Description; which was not adverted to in *Wydown*'s Case. That Statute directs a Commission to be granted upon Complaint in Writing against such Person or Persons, "*being Bankrupt.*" The Affidavit, the Form of which was settled at a very distant, though uncertain, Period, may be considered as a contemporaneous Construction of the Acts; conclusive, that the Party must be a Bankrupt at the Period, when the Affidavit is made. A similar Observation applies to the Bond, given by the petitioning Creditor; the Words of which, when alluding to the Bankrupt, are, that he "*is become* Bankrupt."

(*a*) 8 T. R. 507.
(*b*) 14 *Ves.* 80.
(*c*) 5 *Geo.* 2. c. 30. s. 24.
(*d*) 13 *Eliz.* c. 7. s. 2.

The

1812.

DUFRENE. *Ex parte.*

Commission on a concerted Act of Bankruptcy supported by another Act of Bankruptcy.

The Lord CHANCELLOR.

What then do you say, to that Class of Cases, in which the Court of *King's Bench* has repeatedly decided, that if a Commission be taken out on a concerted Act of Bankruptcy, yet if any other Act of Bankruptcy be proved, it shall avail to support the Commission? Those Cases, at least, have some Application to this; as, if a Commission can be made good only by an Act of Bankruptcy, actually committed, when the Docket is struck, all those Cases are bad.

Act of Bankruptcy by Imprisonment for Debt relates to the first Day.

This also goes a great Way to affect the Language of the Bond and Affidavit, and all the Reasoning, deduced from it. The Affidavit required is only, that the Deponent believes, the Party is a Bankrupt: that is, among other Things, has committed an Act of Bankruptcy. The Witness may conscientiously swear that according to such a State of Facts, as may with great Propriety induce such a Belief. If he does, and the Commission afterwards issues, the Time having expired, making the Act of Bankruptcy by relation to the first Day, what is the Impropriety, if, when he can support the Commission, not only by that Act of Bankruptcy, but by others, he selects, that Act of Bankruptcy? Suppose a Commission taken out upon a concerted Act of Bankruptcy; which is nothing; that the Man happened to be lying in Prison; and the Two Months expired, before the Commission issued: would not that support the Commission according to the Cases, in the Court of *King's Bench,* to which I have alluded? There is nothing, confining the Person, making the Affidavit, to Belief, that this is the Act of Bankruptcy, upon which he is finally to proceed. Lord *Kenyon* in *Gordon* v. *Wilkinson* did not recollect, that the Man does not swear to Knowledge of an Act of Bankruptcy, which he knew had not been committed. In the Result,

it

1812. DUFRENE, *Ex parte.*

it is true, there may be no Act of Bankruptcy except that of lying in Prison: but it does not follow, that he did not believe the Man was a Bankrupt.

Mr. *Cullen.*

If a Commission can be taken out Two Days before the Expiration of the Two Months, why may not the Affidavit be made on the very Day the Bankrupt goes to Prison? How great will be the Inconvenience; and where can the Line be drawn?

Sir *Samuel Romilly,* and Mr. *Cooke,* for the Assignees.

Wydown's Case, decided on mature Reflection, determines the present; which is in Truth an Appeal from that Case. Lord *Raymond* held, that lying in Prison Two Lunar Months will make the Party a Bankrupt from the Time of the first Arrest; including the Day of the Arrest (*a*) *Gordon* v. *Wilkinson* furnishes a mere *Dictum* of Lord *Kenyon*; and cannot be cited as a Decision. In *Glassington* v. *Rawlins* (*b*) it never occurred to any one to take this Objection; and that is the very Case now made. There is no Decision, that can support this Objection; which, if it prevails, will over-rule *Wydown's* Case. The Statutes of *Elizabeth* and *James* did not require an Affidavit: the 5th of *George* the 2d was the first Act, that required any Debt to be ascertained before the Commission issued. Previously the *Lord Chancellor* was invested with a Discretion. All, that the Commissioners have to look to, is the Commission under the Great Seal. The Docket, which consisists in making the Affidavit, giving the Bond and presenting the Petition, is never produced to them. If an Act of Bankruptcy is

(*a*) See 1 Co. Bk. La. 97. (*b*) 3 *East*, 407.

 proved

1812.

DUFRÊNE. *Ex parte.*

proved anterior to the Date of that Commission, it is sufficient. There was in this Case no Injury done to the Bankrupt: he was not declared a Bankrupt, until he actually was one; and there were other Acts of Bankruptcy, that would, if necessary, have been proved against him.

The Lord CHANCELLOR.

With regard to the Question, whether this Commission is to be superseded on account of the Nature of the only Act of Bankruptcy, now before me, I feel a strong Persuasion, that the Opinion I expressed in *Wydown's* Case is right. If the Commission is supported by this Act of Bankruptcy, lying in Prison Two Months, compleated before the Commission sealed, a Court of Law could not deal with it in any way; as I adhere to the Opinion I expressed in that Case; that, if the Act of Bankruptcy was compleated at one Period of the Day, on which the Commission issued, and it can be shewn by Evidence, that the Act of Bankruptcy was compleated, before the Commission was sealed, (it may be difficult to apply that to this particular Act of Bankruptcy), however imprudent it might be not to wait until the next Day, yet that would be a valid Commission. It would therefore have been enough here to have proved a sufficient Debt, Trading, and this Species of Act of Bankruptcy, actually compleated before the Commission taken out.

Fraction of a Day; to support a Commission of Bankruptcy; by Evidence, that it was committed before the Commission sealed on the same Day.

If that is so, I declare farther, that it does not therefore follow, that a Commission as it is good at Law, is not to be superseded here: but the true View of the Subject is this. If when Lord *Kenyon* made that declaration where he speaks of Perjury (*a*), his Notion was, that the Person, making the Affidavit, which is in Fact striking the Docket, was to be understood as swearing, that the

Commission of Bankruptcy, though good at Law, may be superseded.

(*a*) *Gordon* v. *Wilkinson*, 8 Term Rep. 507.

Act

1812.

DUFRENE, *Ex parte*.

Act of Bankruptcy, constituted by lying in Prison Two Months, was then committed, the Term "Perjury" might be well applied to that; if the Man was absurd enough to swear so as to a Person, who had been in Prison One Month only. That would be both legal and moral Perjury. This however is not the Species of Guard, under which the Law has placed the Person, against whom a Commission issues. It is undeniably true, that the Law does not require an Affidavit of what is the Act of Bankruptcy the Witness believes to have been committed. All, that is required, is an Affidavit of his Belief, that the Party has committed an Act of Bankruptcy. In Practice, I fear, though that Person, &c. swearing to his Belief, that Acts of Bankruptcy have been committed, can never enable himself to prove, that any one of those Facts, to his Belief of which he swears, did exist, yet, if after the Commission issued he can prove some other Act of Bankruptcy, committed even in the Interval between the Affidavit made and the Commission issued, of which he knew nothing, I should be bound by the Law and the Practice to say, the Commission was valid.

When the Commission is produced before the Commissioners, they never do, nor have they any Right to, enquire more than, whether an Act of Bankruptcy was committed before the Commission sealed. They are in the same Circumstances as a Court of Law. There is no Doubt, if the Affidavit stated the Act of Bankruptcy by lying in Prison Two Months, and you suppose it possible, that the Person, swearing that, knew, that the other had not been so long confined, that would supersede the Commission; as that would be Perjury; but the Question is, whether, as that Act of Bankruptcy by lying Two Months in Prison was not committed, I must conclude, that the Creditor had no other Ground for his Belief, that an Act of Bankruptcy was committed. If a Man was called on

1812. DUFRESNE, *Ex parte.*

Commission on a concerted Act of Bankruptcy supported by another Act, though subsequent to the Affidavit of Belief.

to make an Affidavit of such an Act of Bankruptcy on a particular Day, and the Commission having issued on that Affidavit, it proved not to be true, in this Sense, that it was a concerted Act, I should supersede the Commission; though other Acts of Bankruptcy were committed in the mean Time: but this is the universal Practice; that, though the Commission issued on the Oath of a Man, stating his Belief, that an Act of Bankruptcy has been committed, and no one can doubt, that he really had no Knowledge of any Thing but the concerted Act of Bankruptcy, the Affidavit being only as to his Belief, if there were other Acts of Bankruptcy, committed subsequently, of which therefore he could know nothing, the constant Habit at Law necessarily has been to support such Commissions: but I say, there is no Instance of an Application here to supersede a Commission on the Ground, that it appears to have been founded on an Act of Bankruptcy, of which the Person, swearing to his Belief, could have neither Knowledge nor Belief at the Time of the Affidavit made; as it had at that Time no Existence; and, if I was to supersede this Commission on the Ground, that the particular Act of Bankruptcy was not compleated at the Time of the Affidavit made of Belief, it would be a Source of Petitions on this Head, of which there would be no End; requiring, that the Practice should be reformed; and that the Affidavit should specify the particular Act.

I admit the Consequence, that has been stated; that, if this Affidavit may be made before the End of the Two Months, it may upon the first Day; but I say, the Witness, so swearing, is guilty of Perjury; if he does not believe, that other Acts of Bankruptcy were committed; and there is no Security except the Conscience of the Man, who will make the Affidavit; and give the Bond. The Evil therefore is as much the first Day as the last; but no more.

Upon

Upon this Sort of View it appeared to me, under Circumstances much more hard, that I could not be called on to supersede the Commission on this Ground; and in this Case, if there is no other Ground, it is impossible to say, superseding the Commission is *ex Debito Justitiæ* in this Sense, that no other Commission could issue; as another might immediately be taken out: but I do not go on that; conceiving the Law to be, as I have stated it. 1812. DUFRENE, *Ex parte.*

The Lord CHANCELLOR said, that upon looking at the Acts of Parliament and all the Cases, his Opinion was unaltered; and dismissed the Petition. *Dec. 6.*

TOMLINSON, } *Ex parte.* 1812.
BROADHURST, } *Dec. 5.*

ONE of these Petitions prayed, that a Commission of Lunacy might issue. The Petitioner was a First Cousin of the alledged Lunatic; and the Application was opposed by his Brother and Sister; under whose Care he was; who by the other Petition prayed, that, if the Commission should be granted, the Execution of it might be delayed for Six Months; and that they might have the Carriage of it.

Commission of Lunacy the Subject of Discretion; regulated solely by the Benefit of the Lunatic, with reference to the Care of his Person and Property; not of course, therefore upon the mere Fact of Lunacy.

The nearest Relations, though opposing a Commission of Lunacy, shall have the Carriage of it, if granted; unless some Reason to the contrary.

Mr. *Hart*, and Mr. *Horne*, in support of the Petition for a Commission.

Sir

1812.
TOMLINSON, *Ex parte.*
BROADHURST, *Ex parte.*

Sir *Samuel Romilly*, and Mr. *Wetherell*, for the other Petitioners, admitted, that, if the Commission issues of course, upon the Application of any Person; a mere Stranger, the Gentleman, who was the Object of this Petition, was not at this Moment capable of managing his Affairs: but they insisted, that this Commission is peculiarly the Subject of the *Lord Chancellor*'s Discretion; that this must be considered as the Application of a total Stranger; as there are such near Relations, a Brother and Sister; who were most unwilling, that such a Step should be taken; as, not merely unnecessary for any Purpose, with reference either to the Person or Property, but likely to produce the most fatal Consequences: with the Prospect of a speedy and compleat Recovery the Knowledge of such a Circumstance, when attaining the Verge of Reason, might occasion a Relapse.

The Lord CHANCELLOR.

It has not been contended on either Side, that the Person, exercising the Office of *Lord Chancellor*, is in the Excercise of that Authority, which he holds by special Commission, bound to issue a Commission of Lunacy, whenever the Fact of Lunacy is established. It is not necessary therefore to state the Grounds of the Opinion, upon which I have acted in that Respect; and I should be sorry, if I had to exercise such an Authority; as, the Object of such a Proceeding being the Welfare of the Party, I know, that by granting it in many Cases I might for ever prevent the Cure.

I had Occasion to consider this Subject lately upon an Application for a Commission in the Instance of a Lady; who was unquestionably a Lunatic. She was under the Care of her Husband; who opposed the Application. Discharging, as well as I could, the Duty of considering, whether

1812.

TOMLINSON, *Ex parte.*
BROADHURST, *Ex parte.*

whether there was any thing in his Conduct, with reference to the Care of either her Property or her Person, which called upon me to interpose, I came to the Conclusion, that no sufficient Ground was laid; and I refused to grant the Commission. That expresses my Opinion upon the general Point.

The true Point upon this Application for me to consider in the Exercise of this most delicate and important Authority, committed to me, is, whether it is really necessary for the Benefit of the Lunatic, with reference to his mental Health and his Property, that a Commission should issue. The Subject has been treated with great Propriety in avoiding particular Detail; which was unnecessary; as my Habit is well known of reading all the Affidavits in the Execution of such a Duty; which I will carefully do in this Case.

If the Commission should go, there is no Reason, why the nearest Relations should not have the Carriage of it; by which I do not mean to intimate, that there was any thing improper in the Application.

The Lord CHANCELLOR on a subsequent Day said, he was inclined to think, that the proper Order would be, that the Petition should stand over until the first Seal after next Term, in order that a Physician should certify, what the State of the Patient is.

BROWN,

Lincoln's Inn Hall.
1812.
Dec. 7, 8.

BROWN, *Ex parte.*
MUNTON, *Ex parte.*

A second Commission of Bankruptcy against an uncertificated Bankrupt, is void.

A joint Commission therefore issuing after a separate Commission, taken out by joint and several Creditors, the separate Commission can be superseded only for the Benefit of the Creditors; with Costs to the petitioning Creditor, if acting with good Faith; and securing all his Rights as a joint and several Creditor, to prove, and elect between joint and separate Estates.

THE first of these Petitions stated, that the Bankrupts *Brown* and *Scott* being indebted to the Petitioner on their joint and several Bond, dated the 29th of *July*, 1806, in the Amount of £9607: 18*s*: 4*d*. and also on their joint Note in the farther Sum of £3000, a Commission of Bankruptcy issued on the 2d of *October* last against *Scott*, on the Petition of the Petitioner *Brown*; under which *Scott* was duly declared Bankrupt; and the Petitioner *Brown*, having proved his Debt was chosen Assignee. On the 8th of the same Month a joint Commission issued against *Brown* and *Scott* upon a Docket, struck the 1st of *October*; under which they were on the 10th declared Bankrupts. The Petitioner applied to prove his Debt, and vote in the Choice of Assignees, under the joint Commission: but the Commissioners rejected the Proof of his Debt. The Petition stated, that the separate Commission was taken out with the View of having the Effects administered under a valid Commission, and from an Apprehension, that a Commission was about to issue upon a concerted Act of Bankruptcy: the Bankrupts having, in Answer to an Application by him on the 1st of *October*, informed him, that at Two o'clock that Day a Meeting was to be held at the Office of their Solicitors, to consider of the Necessity of their becoming Bankrupts.

The Petition prayed, that the joint Commission may be superseded; or that the Petitioner may be at Liberty to prove under the joint Commission.

The

The second Petition, presented by the Assignees under the joint Commission, prayed, that the separate Commission may be superseded at the Costs of the petitioning Creditor; that the Bond Debt, proved by him under such Commission, may be transferred as a Proof on the separate Estate of *Scott* under the joint Commission, and that the petitioning Creditor under the separate Commission may pay the Costs of this Application.

Sir *Samuel Romilly*, Mr. *Hart*, Mr. *Bell*, and Mr. *Montague*, in support of the first Petition.

The Petitioner applied to prove his Debt under the joint Commission; and the Commissioners refused to allow the Proof on the Ground; that by taking out the separate Commission he had made an Election to abide by his Rights as a separate Creditor: and that is pressed to this Extent; that, if the separate Commission shall be superseded, he shall not come on the joint Estate; but shall be confined to the separate Estate by a Transfer of his Proof to the joint Commission. By superseding the separate Commission every Thing, done under it, must fall with it; and the Petitioner could no longer be considered as having proved under it: but in strict Law the joint Commission, being taken out against a Bankrupt, who had not obtained his Certificate under a prior Commission, is void. A second Commission can apply only to Property, acquired since the Certificate under the former Commission. This joint Commission therefore, if disputed, could not possibly be supported. What proceeding at Law could be maintained upon it for civil, much less for criminal, Purposes? Clearly the Estate ought not to be burthened with the Expence of both Commissions; and if for the Benefit of the Creditors, upon any Principle of Convenience, your Lordship goes the Length of superseding the separate Commission, which

1812. BROWN, *Ex parte* MUNTON, *Ex parte*.

which may be properly termed the legal Commission the petitioning Creditor must not be exposed to farther Inconvenience or Injury; having a Right to consider himself in *statu quo*; and have Recourse for Satisfaction to those Funds, whether joint or separate, to which, had he never sued out the separate Commission, he might have resorted.

Mr. *Leach*, and Mr. *Cooke*, for the second Petition.

The first Petition has two Objects: one to supersede the joint Commission; as proceeding on a concerted Act of Bankruptcy: but no Commission, was ever more hostile. It is sworn by the petitioning Creditors, that they had no Communication whatever either with the Bankrupts, or their Solicitors. This Part of the first Petition therefore fails. The next Object is, that *Brown* may prove under the joint Commission; proceeding on the Supposition, that both Commissions are to stand. The Question is, whether he has done any Act, binding him as an Election to stand as a separate Creditor. Admitting for this Purpose, that by merely taking out a separate Commission he has not made such Election, he has gone farther: proving his Debt; and causing himself to be chosen Assignee under that Commission. Those Acts amount to an Election, not to be avoided.

The Question, whether a second Commission must be superseded, or not, depends entirely upon this: under which Commission the Property can be most conveniently administered. Here it can be administered only under the second Commission. The object of the second Petition is to place Mr. *Brown* in the same Situation under the joint Commission, as he stood in under the separate Commission; in other words to confine him to the separate Fund. The Great Seal by its dealing with the first or second

1812.

Brown, *Ex parte.* Munton, *Ex parte.*

second Commission ought not to affect the Rights of the Parties; especially when those Rights arise out of the Situation, in which they have placed themselves. With respect to the Costs of superseding the first Commission and of this Application *Brown* had full Notice, that the Docket for the joint Commission was first struck. It must be looked at with reference to the Benefit to the Estate; and no Benefit could arise by taking out the separate Commission. If he thought the second Commission a concerted one, he should have presented a Petition to supersede it, and have taken out another Commission. He has occasioned the Costs; and ought to pay them. A Creditor cannot proceed both against the joint and separate Estate. The Foundation of *Brown's* Debt is a joint and several Bond; and he has a Right to be considered under the Circumstances as the separate Creditor of the Two Bankrupts, but not as the joint Creditor of both. The Case of *Crispe* v. *Perritt (a)* has occasioned great Difficulty. The Judges proceeded on the Ground, that a Commission is to be considered as an Execution, and not as an Action: but the separate Commission was not a joint Judgment; and therefore, though under a Joint Judgment the Plaintiff could have several Executions, that did not surround the Point. That Case however does not embarrass the present; as here is a joint and several Debt. The Order, which the second Petition prays, is not uncommon: there have been many Orders, where the separate Commission has been superseded, to transfer the Proof from the separate to the joint Commission; confining it to the Fund of the separate Estate. This is giving Mr. *Brown* all the Benefit he could have under the separate Commission.

Sir *Samuel Romilly*, in Reply.

(a) 1 *Willes's* Rep. 467.

If

1812.

BROWN, *Ex parte.* MUNTON, *Ex parte.*

If there were no other than *Brown's* Petition, it would not be a Question of Convenience, which of the Commissions shall stand: the second being a void Commission: a separate Commission previously existing; under which *Scott* had been found Bankrupt. The second Commission, as it could not legally be sued out, must be superseded; and your Lordship has no Discretion. If the separate Commission were superseded, there would be no Difficulty in admitting *Brown's* Proof under the joint Commission. The mere Act of taking out the separate Commission is not in itself an Election, precluding that Proof; and as to his farther Acts by proving, and accepting the Appointment of Assignee, under it, suppose such a Commission taken out by a Person, who was a joint Creditor only; acting as he might have done exactly in the same Manner as *Brown*. Every thing, that has been done by him, is equivocal; and may be referred either to his separate or joint Debt. There is therefore nothing, that amounts to an Election. Though the second Commission does not appear to have been concerted, the Communication, that was made to *Brown* was sufficient to excite Suspicion.

The Lord CHANCELLOR.

I always felt great Difficulty in understanding the Principle, upon which for a long Time a joint Commission and a separate Commission were permitted to go on together. My Opinion has always been, that if the joint Commission was the first, the separate Commission was in Law good for nothing; and, if the separate Commission was the first, the joint Commission was bad (*a*). Unless therefore it was by the Effect of amicable Arrangement, to which the Debtors, both joint and separate, lent themselves, it is very difficult to conceive, how any Person

(*a*) *Ex parte Martin*, 15 *Ves.* 114 *Ex parte Lees*, 16 *Ves.* 472.

could

could effectually proceed at Law under the second Commission either for Civil or Criminal Purposes. A Commission of Bankruptcy has been often stated to be the Right of the Subject; and I do not recollect an Instance, that the Person, taking out the first Commission, was ever made to pay the Costs of superseding it, or that his Costs were refused to him, unless it was taken out against good Faith: that is, by counteracting an Endeavour to produce an Arrangement without a double Expence.

1812.

BROWN *Ex parte.* MUNTON, *Ex parte.*

Commission of Bankruptcy the Right of the Subject.

It is not enough here to say, that this Petitioner, who has the legal Commission, can lose the Benefit of it; unless, as it seems to be admitted, he is indemnified against the Costs of the *Supersedeas*: also having got the valid Commission in his Hands, he was not bound to come here to supersede his own Commission: much less when it seems to be contended, that, if his Commission is superseded, and *a fortiori* if superseded at his own Request, he must be considered as having made his Election; and is to have his Demand transferred as against the separate Estate of *Scott* under the joint Commission. The difficulty I have always felt upon the Case of *Crispe* v. *Perritt* (*a*) is, what was to become of the Demand against the other Persons. Under a joint Bond an Action might be brought against both: under a joint and several Bond the Obligee, though he might have several Executions, could not bring a joint, and also Two several, Actions. The great Difficulty, what was the Effect of that Commission as to the Two Partners, who were not the objects of that Commission, was entirely overlooked. That Difficulty however does not occur here; as this Creditor might by virtue of his separate Security prove against either;

Difficulty from the Decision (*Crispe* v. *Perritt*), that a separate Commission of Bankruptcy may issue upon a joint Debt; with reference to the other Partners.

Under a joint and several Bond the Obligee, though he might have several Executions, could not bring a joint and also several Actions.

(*a*) 1 *Willes's* Rep. 467. 1 *Cooke* Bank. Law, Ed. 6, 20.

1812.

BROWN, *Ex parte.* MUNTON, *Ex parte.*

Difficulty of considering a Commission of Bankruptcy as an Execution in a strict Sense.

Consequence of superseding a Commission of Bankruptcy all falls with it.

either; under all the Difficulty however of considering a Commission of Bankruptcy as an Execution in a strict Sense: but it is not to be contended, that this is an Election by this Creditor; unless he is to have the whole Benefit of what he elects to do. He has the valid Commission; and, if the valid Right, which he has, is to be removed, that is for the Benefit of all the Creditors; and must not be at the Expence of him, who has the valid Right; which cannot be taken from him; unless he chooses to relinquish it. It is said, the Transfer of his Proof as against the separate Estate of *Scott* is no Injury: but, a Commission being superseded, all falls with it; and that is a Course I have no Right to adopt except for the Benefit of all the Creditors.

If therefore this separate Commission is to be superseded, it must be upon an Understanding, that he is to have all the Rights of a joint and separate Creditor; and it must be accompanied with an Order, that he shall prove as a joint Creditor; if he thinks proper. As to the Costs, the Petitioner must have the Expences of superseding the Commission, whether in the form of a Petition or a Writ. With regard to the rest, he seems in that Conversation to have had some Reason to believe, that the joint Commission was taken out upon a concerted Act of Bankruptcy: but it proves not to be so; that there was no Collusion: as to that therefore there must be no Costs.

FOX,

LINCOLN'S INN HALL.
1812.
Dec. 8, 9.

FOX, *Ex parte.*

Patent granted for an improved Steam-Engine; as not infringing upon an existing Patent.

If the Improvements could not be used without the Engine, for which a Patent had been granted, they must wait the Expiration of that Patent.

No Costs, where the *Caveat* was not unreasonable.

THE Petitioners, having applied for a Patent in respect of certain Improvements in Steam-Engines, a *Caveat* was entered under an existing Patent; from which, it was alledged, the new Patent was borrowed; and with which it would interfere: the Affidavit of an Engineer stating, that they were not the same, nor in any Respect resembling each other.

Sir *Samuel Romilly*, and Mr. *Johnson*, in support of the Petition.

Mr. *Hart*, for the other Patentee.

The Lord CHANCELLOR.

I take it to be clear, that a Man may, if he chooses, annex to his Specification a Picture, or a Model, descriptive of it: but his Specification must be in itself sufficient; or, I apprehend, it will be bad. If the Petitioners have invented certain Improvements upon an Engine, for which a Patent had been granted, and those Improvements could not be used without the original Engine, at the End of Fourteen Years, the Petitioners could make Use of a Patent, taken out upon their Improvements; though, before that Period expired, they would have no Right to make Use of the other's *Substratum*. At the End of that Time the Public has a Choice between the Patents. My present Opinion is, that this Patent must go: but I will read the Affidavits; and see the Parties, and their Models.

1812.
Fox,
Ex parte.
Dec. 9.

The Lord CHANCELLOR.

This is a very difficult Subject to deal with: but upon not an inattentive Consideration I think, I am not justified in with-holding this Patent. I do not like to give Costs in a Case of this Kind. I cannot say, the Jealousy on the other Side was unreasonable.

LINCOLN'S INN HALL,
1812,
Dec. 10.

GOURLAY *v.* THE DUKE OF SOMERSET.

An Injunction, though not to be continued with a View to specific Performance of an Agreement to grant a Lease, if under a Clause for Re-entry the Lease, when granted, would be at an End by the Tenant's Acts, was maintained upon undertaking to give Possession, when required by the Court, and paying the Rent due, by Waiver of the Forfeiture, if incurred: viz. distraining for subsequent Rent.

Whether, even without a Right of Re-entry the Court seeing a gross Case of Waste and Breach of Covenant, not to be indemnified by Damages, would leave the Tenant to Law, refusing Relief, *Quære.*

Under a Right of Re-entry upon under-letting an Advertisement does not a work of Forfeiture; but was made the Ground for imposing Terms.

Refusal of Tenant to execute a Lease tendered, as satisfied with, not as repudiating, the Agreement: is no Ground for refusing him a specific Performance.

ON the 17th of *May*, 1809, a written Agreement was entered into between the Plaintiff and the Defendant; whereby the latter agreed to let the former a certain Farm, called *Deptford Farm*, by a Lease from the 10th of *October* then next for Twenty-one Years; and to allow the Plaintiff £200, and such farther Sum, as the Defendant should upon Inquiry find proper, and necessary, for the Purpose of putting the Buildings in Repair, and making necessary Alterations and Improvements; to

be

1812.

GOURLAY v. The Duke of SOMERSET.

be first approved by the Duke, or his Agent. The Plaintiff agreed not to plough or break up certain Lands; and to cultivate in the most approved Manner. He was to be at Liberty to carry off the Hay and Straw upon Condition of returning Two Loads of Manure for every Load of Hay or Straw taken off; but was not to let, set or assign over the Premises, without first giving or procuring a good and sufficient Security to the Satisfaction of the Defendant for Payment of the Rent and performance of the Covenants: and it was also agreed, that a Lease and Counter-part should be prepared; and executed by the Parties; which should contain all such Conditions, Reservations and Agreements, with respect to Cultivation, and the Manner, in which the Farm should be left, "and "all such usual and proper Conditions, Reservations, and "Agreements, as shall be judged reasonable and proper "by *John Gale*, of, &c. Land Surveyor; and in case of "his Death by some other proper and competent Person "to be mutually agreed upon by the said Parties."

On the 10th of *October*, 1809, the Plaintiff was put in Possesession of the Lands; and afterwards of the Buildings. Disputes arising between the Parties, and the Defendant having served the Plaintiff with a Notice to quit the Farm in *October*, 1812, the Bill was filed; praying a specific Performance; and Compensation for not having Possession of the Buildings on the 10th of *October*, 1809,: and an Injunction to restrain the Defendant from proceding at Law.

The Answer, admitting the Agreement, alledged specific Instances of improper Cultivation of the Farm on the Part of the Plaintiff; and stated, that the Defendant had caused a Lease to be prepared conformably to the Agreement; which Lease was executed by the Defendant on the 25th of *October*, 1811; and the Lease and a

1812.
Gourlay
v.
The
Duke of
Somerset.

Counter-part were tendered to the Plaintiff; who was required to accept the Lease, and execute the Counter-part; which he refused to do; acknowledging that he had not read the Lease; but stating, that he had considered the Agreement sufficient for him.

The Answer also alledged Waste by the Plaintiff in cutting Timber, digging Chalk, and pulling down the Buildings, and converting the Materials to his own Use: that the Plaintiff had let off part of the Farm without the Defendant's Consent; and that on the 19th of *October*, 1812, an Advertisement appeared in the *Salisbury* Paper, whereby the Plaintiff advertised to take in, to winter upon Turnips and Hay upon *Deptford Farm*, 500 or 600 Sheep; that from *Lady-day* next the whole of the above Farm would be let as a Sheep-walk; and that a Lease of it would be granted for a Farm, with no Restriction as to folding; all which the Defendant insisted were Breaches of the Agreement between him and the Plaintiff.

An Injunction having been obtained; the Defendant, upon putting in his Answer, obtained an Order for dissolving the Injunction *Nisi*.

Sir *Samuel Romilly*, and Mr. *Joseph Martin*, for the Plaintiff.

Three Objections are taken by the Defendant against the specific Performance, which this Bill prays. First, it is alledged, that the Plaintiff has not used the Farm in an husband-like Manner. There is no Proviso to make the Lease void on that Account: and there are Covenants, on which the Defendant may proceed, if he is injured. The next Objection is, that the Plaintiff is about to underlet: but the Agreement gives him in Terms the Liberty to do so; requiring only, that he shall first enter into

sufficient

1812.

GOURLAY v. The Duke of SOMERSET.

sufficient Security for the Rent and Performance of the Covenants. The third Objection is, that a Lease has been tendered to the Plaintiff; and he has refused to execute it. That affords no Ground for turning the Plaintiff out of Possession; as he has not waived or abandoned the Agreement: on the contrary the Reason given, that he considered the Agreement sufficient for him, shews his Intention to stand by and affirm it. If this could amount to a Waiver, the Defendant must have accepted it, as such: but he has since done Acts, affirming the Tenancy: distraining for Rent subsequently due.

Mr. *Hart*, Mr. *Bell*, and Mr. *Heald*, for the Defendant.

If a proper Lease be tendered to a Party, which he refuses to execute, he cannot come into a Court of Equity for the specific Performance of a Contract for that Lease. This Court exercises a judicial, though not an absolute and uncontrouled, Discretion in decreeing specific Performance. This is not a Case for that Decree: a Tenant, pulling down Buildings, cutting down Trees, digging Chalk, &c. is not entitled to Favor, and the extraordinary Aid of a Court of Equity. This is an attempt to take from the Arbitrator the Power to decide upon the Covenants of the Lease; and to give it to the Master. The Refusal of the Plaintiff to execute was a Refusal to abide by the Terms of the Lease. Refusing to sign the Counterpart, he disclaimed that Contract, of which he now seeks a specific Performance. If the Agreement had been executed, the Defendant would have had a Right to enter for the Forfeiture, incurred by, not merely permissive, but wilful, Waste. The Court would not have relieved against that Forfeiture; and why is the Tenant in a better Situation; having a Contract merely executory?

Sir

1812.

GOURLAY v. The Duke of SOMERSET.

Sir *Samuel Romilly*, in Reply.

The Answer imports merely, that the Defendant's Agent drew the Lease; and, if it really contained a Clause of Forfeiture, the Plaintiff might have objected to it, until approved by *Gale*. The Court has never dissolved an Injunction against turning a Tenant out of Possession, for Acts, which would be a Breach of Covenant, unless it was perfectly clear, that the Lease, if granted, would be at an End, by a Clause of Re-entry. Much of the Waste complained of is equivocal: and, as to carrying off the Hay, he has a right to do so; taking care to return the Dung. No Authority has been cited to prove, that a Tenant's Refusal to execute a Lease, supposing him wrong, shall affect his Right to a specific Performance. The Cases, in which it has been refused on that Ground, have proceeded upon this; that the Refusal was an actual Repudiation of the Contract; conclusively putting an End to it. The Advertisement, which is imputable to the warmth, arising from these Disputes, cannot have the Effect of a Forfeiture.

The Lord CHANCELLOR.

Dec. 10.

With regard to the Habit of this Court continuing an Injunction, where a Farm has been held, and treated, in a grossly unhusbandlike Manner, and where there would have been a Right of Re-entry in the Lease, if a Lease had been executed, I have said, and I think that right, that I would not continue an Injunction with a View to a specific Performance, which, if the Agreement was specifically performed by executing a Lease, would have been put an End to by the Clause of Re-entry, that must have been introduced in that Lease. That however does not apply to this Case; as, if the Execution of a Lease, of the

the same Date as the Agreement, should be now directed, intermediate Acts having passed, which will amount to a Waiver of the Forfeiture, this Court, decreeing a specific Performance, would not allow the Landlord to take Advantage of the Fact, that the Lease bore Date, before it was actually made, and exclude the Tenant from the Benefit of the Circumstance of Fact, which would have been a Waiver of the Forfeiture at Law.

I will not undertake to say, whether there have been such Cases as are alluded to; much less, that there never will be such a Case; where, even if no Right of Entry was to be introduced under an Agreement for a Lease of a Farm, yet the Court, seeing a gross Case of Waste, which will in all Cases be a Forfeiture of the Place wasted, considerable, or not, and gross Breaches of Covenant, that could not well be indemnified by Damages, would leave the Tenant to Law, and grant no Relief here: but it is very difficult to raise that Sort of Case from these Circumstances.

If there was a Right of Re-entry for under-letting, the Advertisement would not amount to a Forfeiture. I cannot carry what passed upon the Non-Execution of the Lease to the Extent, that it is an answer to the Bill for a specific Performance; as I agree to the Distinction that the Refusal to execute the Lease must be a Refusal to stand by the Agreement; and, if it goes no farther than that the Man thought the Agreement as good a Lease as he could have, as he well might consider the Agreement of the Duke of *Somerset*, that does not amount to a Declaration, that he never would execute a Lease; and cannot be considered as repudiating the Agreement, with which he declares himself satisfied.

As to the Advertisement, I cannot continue the Injunction

1812. GOURLAY v. The Duke of SOMERSET.

tion but upon the Terms of the Tenant's undertaking to deliver Possession, when required by this Court; with a general Liberty to apply for that Purpose; and upon paying the Rent due.

LINCOLN'S INN HALL. 1812. Dec. 12.

GARDNER, Ex parte.

Separate Commissions of Bankruptcy against Partners, taken out by a joint Creditor on the same Debt, and on the same Day; immediately after Dissolution of the Partnership; and no separate Creditor appearing. A joint Commission having issued, and the petitioning Creditor under the separate Commissions refusing to disclose the Person, who proved the Act of Bankruptcy, the Lord Chancellor, inspecting the Proceedings under the separate Commissions, ordered that Person to attend the Commissioners under the joint Commission at the Peril of Costs.

ON the 26th of *November*, 1812, a separate Commission of Bankruptcy issued against *Landon*, as Partner with *Childs*; and on the same Day a separate Commission issued against *Childs*, as Partner with *Landon*. Both Commissions issued upon the Petition of *Maxwell* and *Dixon*, as Partners, upon a joint Debt, due to them by the Two Bankrupts.

On the 4th of *December* a joint Commission was taken out against *Landon* and *Dixon* upon the Petition of joint Creditors to the Amount of £2874: 2s. 5d. in respect of certain Bills of Exchange. Upon the opening of the joint Commission the petitioning Creditor's Debt and the Trading were proved: but the Commissioners, not being satisfied as to the Act of Bankruptcy, directed *Maxwell* and *Dixon*, and also *Hodges*, the Clerk of the Bankrupts, to be summoned. *Maxwell* accordingly attended on the 5th of *December*, and, being required by the Commissioners to be sworn for the Purpose of being examined touching any Acts of Bankruptcy committed by *Landon* and *Childs*, refused

to take the Oath or to be examined. At the first public Meeting under the separate Commissions no separate Creditor proved any Debt: the only Debt proved being that of *Maxwell* and *Dixon*, amounting to £430. The separate Debts were inconsiderable: but the joint Debts exceed £5000.

The Petition, presented by the petitioning Creditors under the joint Commission, prayed, that the separate Commissions may be superseded either at the Cost of the petitioning Creditors, or of the Estates; that *Maxwell* may be ordered to attend the Commissioners at the next Meeting, to be held under the joint Commission; in order to be sworn and examined before them; and that in the mean Time the Choice of Assignees and all farther Proceedings under the separate Commissions may be stayed.

By the Affidavit of *Landon* it appeared, that on the 18th of *November*, 1812, he and *Childs* dissolved Partnership, and that the Dissolution was advertised in the *London Gazette* on the 21st. By the Affidavits of *Maxwell* and *Landon* all Collusion with each other was denied.

Sir *Samuel Romilly*, and Mr. *Heald*, in support of the Petition.

The separate Commissions are friendly; and were taken out on a concerted Act of Bankruptcy. The Bankrupts were not separate Traders; nor have they any separate Estates. The Commissions were both taken out on the same Day; by one and the same joint Creditor; on the same Debt: and, whether they were concerted, or not, a joint Commission ought to have been taken out. If, as taken out on a concerted Act of Bankruptcy, these two first Commissions

1812.

GARDNER,
Ex parte.

Commissions are bad, that Act of Bankruptcy would support any other Commission.

Mr. *Hart* and Mr. *Cullen*, against the Petition.

The Suggestion, that the separate Commissions were taken out on a concerted Act of Bankruptcy, is positively denied by the petitioning Creditors and the Bankrupts.

The Bankrupts having dissolved their Partnership, it was thought, that separate Commissions must be taken out. These Commissions were taken out in the Exercise of that Right, which as a Creditor the petitioning Creditor possessed. In all the Cases of Applications to supersede separate Commissions, in order to make way for a joint Commission, the Act of Bankruptcy has been proved under the joint Commission; and that Commission has been in force. The petitioning Creditor under the separate Commissions had a Right to resist any Examination, which might tend to invalidate those Commissions; and was justified in suing them out by the Apprehension, that the Bills, held by the Petitioners, were Accommodation Bills; which would not be so strictly investigated under a joint Commission. The Commissioners have no Jurisdiction to examine a Person, not to prove an Act of Bankruptcy, but to give hearsay Evidence, that some other Person had said, he could prove one.

Sir *Samuel Romilly*, in Reply.

This Petition brings forward a Proceeding never before witnessed: Two separate Commissions taken out on the same Debt in the Course of the same Day. It seems to have been considered important, that these Creditors, represented as holding Accommodation Bills, should not vote

vote in the Choice of the Assignees: but this amounts to an Exclusion of all the joint Creditors, except the petitioning Creditors under the separate Commissions (q), and, as it happens, that there are in the present Instance no separate Debts of any Amount, it comes to this; that the petitioning Creditors under the separate Commissions will name themselves Assignees; as no other joint Creditor can vote in the Choice. If the Two separate Commissions are superseded, the joint Commission must stand. The Commissioners have a Right to call before them the petitioning Creditors under the separate Commissions: and though we are not entitled to see the Proceedings, your Lordship will for the furtherance of Justice inform us, who is the Person, who can prove an Act of Bankruptcy.

The Lord CHANCELLOR.

This is upon the Face of it a very singular Proceeding; of which I do not recollect an Instance: Two separate Commissions taken out by the same joint Creditor, for the same Debt, on the same Day; and upon the Proceedings there is some Ground for what has been said; that those, who were to support the Proceeding, had a Fancy, that they must prove them separate Traders. There is nothing in either of the Depositions at first about separate trading: but the Deponent says, they dissolved Partnership on the 21st of *November*; and then in each Deposition is inserted what was not there originally, that each of the Partners has since carried on a separate Trade: but they forget the original Deposition; proceeding to state, that upon the said 21st of *November* they did give their Clerk Directions to deny them. No one called until the 23d; and upon a Denial on that Day the

(a) *Ex parte Ackerman*, 14 *Ves.* 604. *Ex parte De Tastet*, 17 *Ves.* 247.

Commissions

1812. GARDNER, *Ex parte.*

Commissions were taken out; and the Denial proved by their Clerk on the 27th.

No one recollects an Instance of such Commissions. There is no Reason for them; as not a single separate Creditor has appeared. The Effect of these separate Commissions is, that every joint Creditor, except him, who has taken them out, will be excluded. The only Hesitation therefore, that I have about finally disposing of them, is, that it is premature; until they are declared Bankrupts under the joint Commission: but I shall order *Webb*, the Clerk, who proved the Denial, to attend the Commissioners for that Purpose; and, if he does not attend, I will make him pay the Costs of not attending (*a*).

(*a*) *Ex parte Lund*, 6 *Ves.* 781. *Ex parte Higgins*, 11 *Ves.* 8.

LINCOLN'S INN HALL. 1812. *Dec.* 14.

MOSS *v.* BROWN.

Order, that Defendant, a Prisoner in *Newgate* under Sentence for Forgery, being brought up for Want of Answer, should be turned over to the *Fleet*; and then carried back to *Newgate* with his Cause.

THE Defendant, being a Prisoner in *Newgate*, suffering the Sentence of the Court of *King's Bench* upon an Indictment for Forgery, was brought up for Want of an Answer.

Mr. *Shadwell*, for the Plaintiff, moved, that the Defendant might be turned over to the *Fleet*; and that he might then be carried back to *Newgate* with his Cause; and mentioned the Case of *Bowes* v. *The Countess of Strathmore* (*a*), as justifying the Application.

The Lord CHANCELLOR made the special Order in the Terms of that Case.

(*a*) 2 *Dickins*, 711. *Errington* v. *Ward*, 8 *Ves.* 314.

BUTCHER

1812.
Feb. 8. 10.
April 27.
May 2.
Nov. 21.
(9 *Ves.* 382.)

BUTCHER *v.* BUTCHER.
GOODAY *v.* BUTCHER.

Appointment of £200 Stock, though a very unequal Proportion of the Fund, held not illusory.

The Question whether an Appointment is, or is not illusory, must be determined upon the Circumstances of each Case, according to a sound Discretion: the Power, however large the Terms, being in some Degree coupled with a Trust: but an equal Distribution is not required: nor any Reason for the Inequality; unless a Share is clearly unsubstantial.

Under a general Power of Appointment among all the Children by Deed or Will from Time to Time, &c. in default of Appointment equally at Twenty-one, &c. the Death of one above that Age does not prevent an Appointment to the Survivors.

Appointment void as far as it exceeds the Power: viz. to Grandchildren under a Power to appoint to Children.

A PETITION of Appeal was presented from the Decree, pronounced at the *Rolls* (a); establishing the Appointment; except as to the Grandchildren; as to whom it was declared void.

Mr. *Richards*, and Mr. *Trower*, for the Appellants.

It is unnecessary to go through all the Cases upon this Subject; which are so fully considered in the late Case, *Bax* v. *Whitbread* (b). In supporting this Appeal we have the Satisfaction of not contending with the Judgment of the *Master of the Rolls*, upon the Question, whether this Appointment is illusory; as that Question was not decided at the *Rolls*; and comes on now, as if the Cause had been originally heard by your Lordship. The Ground, taken by the *Master of the Rolls*, is, that he will not go farther than actual Decision has gone; and, unless an Instance could be produced, in which the Sum of £100 had been held an unsubstantial Appointment, he

(a) 9 *Ves.* 382.

(b) 10 *Ves.* 31. 16 *Ves.* 15.

would

1812.

BUTCHER v. BUTCHER. GOODAY v. BUTCHER.

would not hold it unsubstantial in this Case. That your Lordship considered as not being the correct Principle; but that, whenever the Question arises, however difficult, the Court must determine it; and go into all the Circumstances. Upon the Result of all the Authorities a Power of Appointment is considered as in the Nature of a Trust, according to the Intention of the Author of the Power, for the Family of the Person, who is to exercise it: a substantial Part must be given; amounting in some way to a Provision: otherwise it is illusory. The Question therefore is, whether a Provision has been made for these Children. It is impossible, that £00 Stock can be represented as a Provision. Mrs. *Butcher* conceived herself at Liberty not to provide for them; assigning, as a Reason, the Disobedience of some: no Instance appearing; except the Institution of a Suit, in which the Costs of all Parties were directed to be paid out of the Fund. During her Life she made very considerable Advances to some of the Children; but gave nothing to Mrs. *Gooday*, except this trifling Fund by the Will. The Court must say, whether this Division, in so great a Disproportion, is such as the Authors of the Power intended. It may be represented, that the Consideration for this Settlement was visionary: the Will of *Ives*, Mrs. *Butcher*'s Father, not being found: but the Intention of *Pickering* and *Partington*, the Devisees in Trust, and the Authors of this Settlement, was to provide, not only for her, but for her Children; and the Object of that Arrangement, into which she came, was to guard against her Partiality and Caprice. Upon all the Circumstances, and the relative Situation of the Parties, the Court will consider this as not a substantial Part of this Trust Fund: not a Provision; that the Appointment is not substantially executed; and is therefore illusory.

Sir

Sir *Arthur Piggott*, and Mr. *Wetherell*, Sir *Samuel Romilly*, and Mr. *Grimwood*, in support of the Decree.

A Variation of this Decree would be a most improvident Interference of this Court with the Discretion of a Parent. The Appeal comes in no reasonable Time; after the Decree has been carried into Execution; except as to the Provision for the Lunatic; all the other Funds distributed; and the Interest of that only remaining Fund has been applied for Eight Years in the Lunacy for her Maintenance. This Appeal is a Speculation; proceeding upon a Misconception of the Case of *Bax* v. *Whitbread*; where your Lordship, affirming the Decree, did not think fit to hold, as an abstract Proposition, that any numerical Calculation could be adopted as the Rule. This is a very peculiar Settlement. The Funds, which are the Subject of the Power, must be considered as the Property of the Mother, however derived; whether by the Will of her Parent; or the Want of a Will; or the Effect of the Act of *Pickering* and *Partington*; it was her Property: they had conveyed to her: and she was treated as a *Feme sole:* no Interest whatever being given to her Husband; not even in the Event of his surviving: no Discretion over his Children beyond what he necessarily had by Law. A Power is given to her alone of providing for Children on Marriage, or otherwise advancing them. So the Powers to raise £4000, and £6000, for such Persons as she should appoint, not confined to Children, are given to her alone. So other Powers over Freehold Estates, and the personal Property, are given to her; excluding her Husband from all Concern in the Property, and Management of the Family.

There must have been Reason for all this. This Settlement reciting the Will of *Ives*: that it had not been

1812.

BUTCHER v. BUTCHER.

GOODAY v. BUTCHER.

found; but that *Pickering* and *Partington*, being willing under the Circumstances to assign all the Interest they would have taken under that Will, had conveyed and assigned to Mrs. *Butcher*; and that, after her Interest was so secured, the Will was found; has a very important Qualification with regard to Children by a future Husband; that she shall not appoint to any Child by any future Husband more than One-half of that residuary personal Estate. This shews the Object. The Inference is, that the Intention of this Parent, and these Trustees *Pickering* and *Partington*, was, that without that Restriction she might have appointed more than One-half of the Residue to an only Child by a future Husband. If they were to take in any way, approaching Equality, a Provision, if that is to be understood as what will provide a Subsistence in Life, where was the Necessity for that Restriction; if she was intended so to execute her Powers, as this Appeal contends? In the Face of this most important Provision, shewing the Intention, that her Power of Distribution was confined only by this Limitation, that if she had Twelve Children by her first Marriage, and only One by a second, she might give One-half to that only Child, distributing the other unequally among the former Class of Children, can it be maintaned, that her Discretion is destroyed: and something is to be substituted, so arbitrary as the Discretion of this Court?

Whatever Opinion the Court may adopt, as an abstract Rule, it will not, under all the Circumstances of this Case interpose. Many Years ago, long before the Date of the Will, some of these Children received different sums, upon Marriage, or otherwise for their Advancement in the World. Will the Court recal those Advancements? Your Lordship's Doctrine in *Bax* v. *Whitbread*, properly understood, is, that each Case mus tdepend upon its particular Circumstances. Lord *Alvanley* in *Spencer* v. *Spencer*,

1812.

BUTCHER v. BUTCHER

GOODAY v. BUTCHER.

cer (a), expressed his Regret, that the Rule had got into the Court; and said, he would not extend it, but would get out of it, where he could; which is the Result of the Judgment of the *Master of the Rolls* upon this Case: the Difference being in Expression rather than in Substance; and that corresponds with your Lordship's Opinion in *Bax* v. *Whitbread;* that the Court has undertaken this Discretion; and cannot adopt any positive Rule of Arithmetical Calculation; holding that not a Case for the Interposition of the Court. The Cases of Appointments set aside as illusory, are, where something was given, so trivial, as to be mere Evasion: a Guinea for instance: perhaps Five Guineas. All the Observations, made in this Case, are applied to one only of these Children, Mrs. *Gooday*: the only one, who received nothing but this £200 Stock. A proportion of that Amount has never been considered illusory; and, if it was less, the Court would feel the Reluctance, expressed in *Kemp* v. *Kemp* (b), to interpose in a Case of such Difficulty and Inconvenience; where the Effect must be to undo all, that has been done; with regard to the Lunatic, as well as the others; reducing her to her original Share of the whole of this Fund; the amount of which has been exaggerated; and does not exceed £11,000. Can the Court act with Success upon a Comparison of the Wants of the different Children? In *Alexander* v. *Alexander* (c) an Appointment of £100 was supported; though £1200 would have been the equal Share. The *Master of the Rolls* in his Judgment upon this Case proceeds in some Degree, but not entirely, upon the Proportion. If £100 is illusory, what Sum can be stated as substantial? That Question was asked, but not answered, at the *Rolls;* and it is upon

(a) 5 *Ves.* 362.
(b) 5 *Ves.* 549.
(c) 2 *Ves.* 640.

 those,

1812.
BUTCHER
v.
BUTCHER.
GOODAY
v.
BUTCHER.

those, who impeach the Appointment, to state the arithmetical Proportion, that will secure, or destroy, the Appointment; to draw the Line between Shadow and Substance; and to lay down in Terms defined and intelligible a practical Rule. If the Opinion as to the arithmetical Proportion, expressed by the *Master of the Rolls*, may be characterized as bold, it will relieve the Court from the insuperable Difficulties, in which it has been so long involved.

Upon what Principle can the Court now say, the Mother was bound to give a larger Sum to this Daughter, a married Woman? All the Children had been maintained by her. Circumstances may be imagined, which, expressing her Sense of her Conduct in general Terms, she could not bring herself to state more particularly. Her Discretion is given in the largest Terms; "subject to such Pro-"visoes, Conditions," &c.; under which she might limit to a Child, so as to determine upon Bankruptcy; and prevent his taking an absolute Interest. All the Cases, imposing the Necessity of giving a substantial Share, have the Qualification, that a Reason may justify the Inequality. The very Object of such a Power is to enable a Parent to make a Provision for the Children according to their Circumstances, and such Events as the Lunacy in this Instance.

Mr. *Richards*, in Reply.

The Principle of this Decree is, that, as there is no Instance, that the Sum of £100 has been considered illusory, it shall not be considered so in this Case. For the purpose of trying that the Fund may be supposed to be of Fifty Times the Amount. The Doctrine, as laid down by your Lordship in *Bax* v. *Whitbread*, is, that this Sort of Power

Power is not considered in a Court of Equity a mere Power; as it is at Law: but the whole Series of Authority in this Court from the Time of Lord *Nottingham* has been, that it is a Power, connected with a Trust for the Benefit of all the Objects; each of whom must have a substantial Share; and what is a substantial Share must be decided by the Court.

This cannot be considered a voluntary Settlement; but, admitting it to be so, the Instant the Settlement was made, and the Trust created, whether before, or after, Marriage, it is the same as between Parent and Child; though not with regard to the Interests of Strangers, under the Statutes of *Elizabeth (a)*. She took the Power by the Donation of these Persons, *Pickering* and *Partington*; standing *in loco Parentis*. The Fund was their Bounty to her, and her Children; and their Intention, that she should execute her Power honestly and fairly, being expressed, she had no Right to appoint so as not to give a substantial Share to each. An ample Provision *aliunde* might, I admit, be a Reason: but it is not clear, that the Court would permit Evidence of the Child's Misconduct to be produced. It has been denied; and with Reason; from the Danger of letting in such Evidence; ransacking the private History of a Family for such a Purpose. The Effect would be that any Parent would have the Power to give almost the whole Property to any one Child; and from the worst Motives. The Court would not endure a Parent, committing a Fraud; and using this Pretence to colour it.

Upon the Authority of *Bax* v. *Whitbread*, and all the preceding Cases, the Principle of this Decree cannot be maintained; and this Share must be considered illusory;

(a) Stat. 13 and 27 *Eliz.*

 not

1812. BUTCHER v. BUTCHER. GOODAY v. BUTCHER.

not sufficient *per se*; and bearing no just and reasonable Proportion to the Remainder of the Fund; therefore not in the View of a Court of Equity an honest Execution. One of these Children wss certainly an Object of great Commiseration: but that will not excuse Injustice to the others. This is not a Question of Feeling; but depends upon a Rule of equitable Justice: which cannot be affected by the Difficulty of recalling what has been distributed. By that Rule this is not a sufficient Share; which is perhaps a more appropriate Expression than "substantial:" such as the Framers of this Settlement intended; and the true Character of the Mother's Act in this Instance is an Attempt to cover a Breach of Trust by excluding this Child from a substantial Share, sufficient to answer the Purpose.

Another Question may be made; whether she could exclude the deceased Child; who was living, when this Deed was executed; and died at the Age of Twenty-three; whether each Child was not entitled at the Age of Twenty-one to an equal Share subject to be devested by Appointment. That certainly was not mentioned at the *Rolls*; being considered immaterial; that Child having died intestate and unmarried; which cannot make a Difference. The Consequence of that Fact, which was not noticed until lately, is, that the whole Appointment is void. The Interest, vested in that Son at the Age of Twenty-one, could not be devested by this Appointment; and forms a fatal Objection to it.

The Lord CHANCELLOR.

I am much struck with the last Objection; and desire, that the Settlement may be looked into. If Ten or Twelve Children, having attained the Age of Twenty-one, had died in the Life of their Mother, leaving Families, the Two Survivors must upon this Principle be considered as the only Objects. Suppose, she had a second Husband;

1812.

BUTCHER v. BUTCHER. GOODAY v. BUTCHER.

band; and all the Children by the first Marriage, having attained Twenty-one, died; leaving Families: she might, it is true, have appointed Life-Estates to them: but under those Circumstances could it be contended, that the Children of the second Marriage were the only Objects; or that as she might have limited Life-Estates to the former Class of Children, an Appointment in Favor of the latter Class would be a good Execution; as she might at an antecedent Period have executed her Power so as to produce the same Effect? This Point requires more Consideration than it has received; as the Cases upon Appointments in Favor of a deceased Child are contradictory: some think, that such an Appointment cannot be: others, that it may in a certain Form; and that a Power, though to be executed by Will, must be so executed as to leave Interests in deceased Children.

May 2.

Sir *Arthur Pigott*, and Mr. *Wetherell*, Sir *Samuel Romilly*, and Mr. *Grimwood*, in support of the Decree.

The Objection, now made, that by the Death of one of the Children, having attained Twenty-one, the Power was gone; and incapable of a subsequent Execution, occurred in the Case of *Boyle* v. *The Bishop of Peterborough* (*a*): a very strong Instance; as, there being but one surviving Child, no Power of Selection, or Distribution, remained: but the Argument, that the Effect of holding the Power to be gone must prevent the Execution by Will, which is open up to the last Moment of Life, prevailed with Lord *Thurlow*. Here the vesting at Twenty-one is applied to the Case of no Appointment, with an anxious Repetition of those Words. The Words "if living" must therefore be im-

(*a*) 1 *Ves.* jun. 299. 3 *Bro. C. C.* 243.

1812.
BUTCHER
v.
BUTCHER.
GOODAY
v.
BUTCHER.

plied; where the Power is to be executed by Will. In that Case *Boyle* had something given to him expressly out of his Grandmother's Property; but that could not apply to the Three other Funds; no part of which was given to him. The Objection, as it is related to those Funds, was not answered by the Gift to him out of another. The Consequence of giving Effect to this is, that all such Powers would be defeated the Moment one Child died; either an Infant, an Hour after Birth, or having attained Twenty-one; if that is the Period, at which the Shares would vest in Default of Appointment. In the Case of *Reade* v. *Reade* (*a*), where there was no Gift in Default of Appointment, the same Circumstance occurred; and it was held, that the Power was well executed. It was not the Intention of this Power to limit the Time, when she might execute by Will; as it is obvious, that a Child might attain the Age of Twenty-one, before she ceased to have children; when she might have by any, or by all, future Husbands. Restrained from giving more than One-half to a Child by a future Marriage, she must either immediately execute her Power, finally and irrevocably, when one Child attained Twenty-one; which would be contrary to the express Words: or after that Event she could not execute: or she might give to the Representatives of a deceased Child. All these Objections were in *Boyle* v. *The Bishop of Peterborough* pressed without Success; and as to the Balance of Inconvenience there can be no Doubt. The Interest of a Child, dying above the Age of Twenty-one, might have been secured by moulding the Power with that View: but they gave her whole Life for the Execution of this Power. The Inconvenience of this Doctrine, that the Power is gone by the Death of one Child above Twenty-one, is very considerable; amounting to this; that the Power shall by no means be

(*a*) 5 *Ves.* 744.

executed

1812.

BUTCHER v. BUTCHER

GOODAY v. BUTCHER.

executed after that Event; the inevitable Consequence of which is, that the Power can be executed by Deed only; not by Will. This last Objection cannot prevail against the Authority of *Boyle* v. *The Bishop of Peterborough*; which has stood uncontradicted many Years.

Mr. *Richards*, and Mr. *Trower*, for the Appellants.

The Authority of *Boyle* v. *The Bishop of Peterborough* is certainly very considerable: yet the Proposition, that, every Child being an Object of the Power, an Appointment, not affecting to give any Thing to one, is a good Execution, seems extraordinary. The Intention of the Author of the Power must govern; which Intention is expressly declared, that each Child shall have a Share exactly as if named; not confined to Children living at the Date of the Will, or any other limited Period. In *Reade* v. *Reade*, which contradicts *Boyle* v. *The Bishop of Peterborough*, Lord *Loughborough* must have proceeded on the Notion, that each Child was to have a Share; that the Father, executing the Power, supposing each of the Four Children entitled to a Fourth, intended to give what each would have taken, if the Power had not been executed.

Here nothing is left for the deceased Child according to the Intention; as what is by mere Accident left unappointed cannot be considered sufficient to answer the Power. The Case is then reduced to this dry Point. There are Ten Children: there might be among them Objects of personal Favor: on account of the infirm Health of some, the Party, having the Power, determines to delay the Execution; and, having a Right to delay the Execution to the last Hour of her Life, though the Effect of that Delay may be, that, all being intended to have sub-

stantial

1812.

BUTCHER v. BUTCHER. GOODAY v. BUTCHER.

stantial Shares, if there is any Appointment, Nine may be prevented from taking any Thing, it cannot be reached as a Case of Fraud. The Court is driven to the Necessity of stating fairly, that the Party may omit to give any Share to a deceased Child. Would the Family of that Child be satisfied by permitting £100 to fall to them? There is no Instance to be found of a Question of that Sort raised: yet it must have frequently occurred; as that Case would create no less Ground of Complaint than an illusory Appointment. If each Child is to have a substantial Share, what Right has the Court to say, one shall have nothing? There is a remarkable Distinction in this Power; making a Provision for any Number of future Families; not confined to the subsisting Marriage; but there is an express Stipulation for a given Share to that Family.

The Lord CHANCELLOR.

This last Point, when it was first mentioned, struck me forcibly; and I had a faint, by no means an accurate, Recollection of some Cases upon it. The Question with reference to this Point is, what is the Law at this Day, as to the due Mode of executing a Power of Appointment by a Parent among all the Children, to be executed at any Time up to the Death of the Parent, even by Deed, or Will; where some of the Children are dead before any Appointment. I put it so: thinking it much better, after the Case of *Boyle* v. *The Bishop of Peterborough*, has stood so long, to abide by it: leaving the Inconvenience, arising from the Doctrine there established, to be met and guarded against by Care, than by disturbing that Decision to throw this Subject again into a State of extreme Uncertainty; or to determine it by a Rule, not reconcileable to any Principle.

This Settlement, which was drawn by Mr. *Partington* himself,

1812. BUTCHER v. BUTCHER: GODDAY v. BUTCHER.

himself, a most accurate Draftsman, is extremely well expressed with regard to the Power. The Peculiarity, that it is to extend to Children of future Marriages, is of little Consequence; as the Word "Children" alone would include Children by any Marriage. It is true in Expression the Interests are to vest in the Children at the Age of Twenty-one, or Marriage of Daughters, and only in Default of Appointment: but, though the Practice of Conveyancers to intimate that expressly is useful, yet, where the Power may be executed by Deed at any Time during the Life, or by Will, which may be the last Act of the Party, though the Instrument does not state, that the Interests shall vest at Twenty-one, &c. in case of no Appointment, or as to what is unappointed, the Implication, that they shall so vest, is necessary, as without that Implication the Power could not continue, as long as by the express Terms it is to continue, capable of Execution. There is in this Case a Peculiarity; upon which it is impossible to conclude, that no one Family, or Class of Children, should take more than another Class by a different Husband. The Event of Children by future Marriages is contemplated; and a Provision is made; not calculated so to limit her Power, that each Family shall take equally: but the Limitation is, that she shall not give more than One-half to the second, or any subsequent Family, or among them all.

Appointment to a deceased Child, or its Representatives, void.

It has been long settled, that an Appointment cannot be made to a deceased Child (*a*); or to the personal Representatives of a deceased Child; and therefore before the Case of *Boyle* v. *The Bishop of Peterborough* it must have frequently occurred, that this might happen; unless by some Circuity or Device the Families of deceased Children were included: where all the Children

(*a*) *Maddison* v. *Andrew*, 1 *Ves.* 57.

were

1812.
BUTCHER
v.
BUTCHER.
GOODAY
v.
BUTCHER.

were intended to take, Eleven out of Twelve might die, leaving Children, and yet, if the Party cannot appoint to a deceased Child, or the Representatives, or to Grand-children, the Consequence must be, guarded as it is too by this Doctrine of illusory Appointment, that the surviving Child would take the whole of that, which was intended for all; unless that can be prevented by other Means than an Appointment.

The old Practice of executing a Power of Appointment, after the Death of one of the Objects, by giving Part to the Survivors, and letting the rest go, as in Default of Appointment, among all, incorrect.

The Mode of executing the Power in the Case of a deceased Child, according to the old Practice of Conveyancers, that prevailed before the Case of *Boyle* v. *The Bishop of Peterborough*, was by giving Part to the surviving Children; making no Appointment of the Residue; which therefore was permitted to go as in Default of Appointment. That certainly was very ill-conceived, and incorrect. The Consequence was, that, as in most Cases the Share unappointed would go among all, who attained Twenty-one, living and dead, as Property vested in them at that Age, or on Marriage of Daughters, it would be divisible among a Child surviving, and all those, who were dead: but it is very difficult, almost impossible, to speak of that Sort of Device as an Appointment. Lord *Thurlow* dissented from that, which I understand to have been the previous Notion of Conveyancers; and established the Rule in that Case of *Boyle* v. *The Bishop of Peterborough*; as it has been stated by Sir *Arthur Piggott*; and Lord *Loughborough* also appears in *Reade* v. *Reade* to have disturbed that Doctrine: giving the Fourth, which according to the old Course would have been divided among the Four, to the Representatives of the deceased Child. I do not perfectly understand the Case; which is quite novel in this Respect: but, if the Doctrine, resulting from it, is not agreeable to what was previously understood to be the Law as to the Fund unappointed, as to the appointed Shares it follows *Boyle* v. *The Bishop of Peterborough*;

Peterborough; which it is better to abide by; leaving the Inconvenience, that may arise from it, to be met by Care, than to exchange it for the old Inconvenience, nearly as considerable; and not got rid of by any Doctrine, resting upon sound Principle. It happens, that there is in this Case a Share unappointed: the portion given to Mrs. *Hall's* Children. It is unnecessary to determine, whether the Doctrine, which prevailed before *Boyle* v. *The Bishop of Peterborough*, would apply; as I certainly shall not disturb that Case; and that is sufficient with reference to this last Objection.

This reduces it to the extremely distressing Point; which has been decided upon the Execution of this Power; and as to that with an unaffected Respect for the Opinion of the *Master of the Rolls*, and not presuming to think my Opinion better, I would rather say, at once, in direct Terms, that the Court ought never to discuss, whether an Appointment, good at Law, is bad here, as being illusory. I do not think the Court is now at Liberty to act upon the Principle, on which this Decree proceeds, or upon that, which I have just intimated may be the better Opinion. If a long Series of Authority has established, that an illusory Appointment is bad, however difficult in each Case to determine, whether the Appointment is, or is not, illusory, taking that Difficulty to be as considerable, as can be represented, the Duty is imposed upon the Court, and cannot be cast off, to meet, and get through it with as much sound Discretion as can be applied.

The real Question therefore, and a very difficult Question, is, whether this Appointment is illusory. In order to determine that Question I will read the Case again: but the strong Inclination of my Opinion is, that this Appointment is not illusory. I think, the Author of this Power has given a very large Discretion; and am much struck

with

1812.



BUTCHER v. BUTCHER. GOODAY v. BUTCHER.

with the circumstance, that the Parent is enabled to do this: if, instead of Twelve, there had been Twenty Children by the first Marriage, and only one Child by a second Marriage, that Child might have had one equal Moiety; and the other Moiety might have been justly divided into Twenty Parts for the first Class of Children. That is one extremely strong Circumstance; there are also other Circumstances, to be attended to; and upon the whole the strong Inclination of my Mind is, that this is not illusory.

The Lord CHANCELLOR.

Nov. 21.

After the Decree was pronounced, from which this Appeal is presented, Two Cases were decided at the *Rolls*; *Mocatta* v. *Lousada* (a); and *Dyke* v. *Sylvester* (b); and the Opinion, intimated in my Judgment upon the Appeal from the Decree in *Bax* v. *Whitbread* (c), that considerable Difficulties occurred to my Mind as to the Principle upon which I understood the *Master of the Rolls* to have decided the three preceding Cases, has produced this Appeal.

It is impossible to describe in stronger Terms than I used on that Occasion the extreme Distress, in which the Rule of this Court, if such as I conceive it to be, places a Judge, who is called on to determine, whether an Appointment is, or is not, illusory. I could not select more apt Expressions than are to be found in Lord *Alvanley's* Judgments; nor more appropriate Terms than those contained in the Judgment of the present *Master of the Rolls*, now under Review; who has intimated this in Substance: that he does not know what is an illusory Appointment; when it is said, a *bonâ fide* substantial Share shall be given to each Object, and, when it has been held, that £100 is such *bonâ fide* substantial share of £1200;

(a) 12 *Ves.* 123.
(b) 12 *Ves.* 126.
(c) 10 *Ves.* 31. 16 *Ves.* 15.

when

when Judges, such as Lord *Alvanley*, have pronounced, that £10 is nothing, delining to say, whether £50 out of £1900 would be a substantial Share: the *Master of the Rolls* states, that he will relieve himself from the Difficulty, belonging to such a Case, by taking the Rule thus: if you can a shew a Case, where the Sum appointed bears the same Proportion to the whole Sum, which is the Subject of the Power, as any other Sum, which has been actually decided to be illusory, with reference to the whole Sum, the Subject of the Power in the Case so decided, he will adopt that Rule of Proportion; that, as the Share, appointed in each Case, does or does not bear the like Proportion, as in the decided Case, it is, or is not, illusory; and, as I understand him, he says, he will proceed upon that Rule, until instructed by higher Authority.

In the Case of *Bax* v. *Whitbread*, where I was compelled to observe upon that Doctrine, I intimated as strong a Wish, as a Judge can entertain, that I could adopt that Principle in Practice; which would relieve us from Distress in a Class of Cases, the most distressing we have to deal with: but it still appears to me, as it did on that Occasion, that where a Power of Appointment was given in Terms, importing the most unfettered Authority, for Instance, among Children, or other Objects, in such Shares and Proportions as the Person, executing the Power, shall think fit, this Court had in a Course of Authority, governing its Decisions for Ages, taken upon itself to say, whether at first upon a sound Principle, or misled by some Misapprehension, that, however large the Terms, the Execution must be governed by a sound Discretion; that it is a Power in some Degree coupled with a Trust; which, if not executed *bonâ fide*, and according to the *Arbitrium boni Viri*, the Execution would be good for nothing; and this Court would resort to that loose Doctrine, as it certainly is, though it has been stated by the greatest

1812. BUTCHER v. BUTCHER. GOODAY v. BUTCHER

greatest Judges, that Equality is Equity; and the Fund is to be distributed, as if no such Power had been given.

Such appearing to me, as it appeared to Lord *Alvanley*, the Course of the Court, I here express with the *Master of the Rolls* my sincere Wish, that it should be corrected by higher Authority: but, unless taught by higher Authority, I cannot disavow the Jurisdiction, so long exercised; whatever the Difficulty of acting upon it may be. Having given to this Subject the most deliberate attention, I find it in such a State of Contradiction, both from *Dicta* and Decisions of great Judges, that, if I had to advise, I could not say, how such a Power can be safely exercised.

Upon a Subject which has been so much the Topic of Discussion and Decision it would be a Waste of Time to trace the Doctrine from beginning to end through all the Cases; as has been my habit: which I hope will produce at least this Degree of Service; that I shall leave a Collection of Doctrine and Authority, that may prove useful. With regard to this particular Doctrine, which originated with Lord *Nottingham*, I observed in *Bax* v. *Whitbread* (a), that I cannot agree with him in the first Case he decided; which went to this Extent; that Equality is Equity; and if that is disturbed by the Exercise of the Power, some extremely good Reason must be shewn. It is impossible to admit, that this is the modern Doctrine of the Court; which gives full Sanction for declaring, that it is not necessary for the Person, executing a Power of Appointment, to give the Subject in equal Shares; and I may upon the Result of the Authorities say, it is now reduced to this; that, unless the Share appears upon the mention of it not to be a substantial Part or Share of the Subject of the Power, the Court never does call on the Person, executing

(a) 16 *Ves.* 15.

it,

it, to say, why he has not given in equal Shares among the Objects.

1812.

BUTCHER v. BUTCHER. GOODAY v. BUTCHER.

In the same, or a subsequent, Case Lord *Nottingham* says, these Powers are to be good according to Circumstances. If he had explained that, it would have relieved the Court; and might have met the Observation, which is now justified; that upon this Subject the Books are full of *Dicta*, marked by Contradiction; and Decisions, with regard to each of which no one might agree with the Judge, who decided it. The Doctrine is as loose as this; that, though a Power is given, to be exercised according to Discretion, as to the Shares, yet in Effect, unless the Judgment of the Person, who was to exercise that Power, agreed with the Judgment of the Judge, who had to decide upon the Execution, it is impossible to know, whether the Execution would, or would not, be good.

Various Contradictions upon the Subject of illusory Appointment.

In this way, through all the Cases, in some it is said, that a Reason for Inequality must be alledged in the Instrument, executing the Power: in others, that you shall be at Liberty to prove a Reason, though not assigned: in some, that, if the Person executing has made another Provision for the Party, who suffers by the Inequality, that is a Ground for holding sufficient the small Sum, which Lord *Alvanley* would have characterised as nothing; the Phrase, by which he describes an unsubstantial Share: but the same Cases say, that, if the other Provision comes *aliunde*, it will not assist the Appointment; others saying, it certainly will; the Person, executing the Power, having only to look to what is reasonable; attending to all the Circumstances, affecting the Situation of each Part of the Family. It has been said by older Judges, that the Power may be executed by a Parent, having Regard to the Conduct of the Child towards that Parent. In later Cases

1812. BUTCHER v. BUTCHER. GOODAY v. BUTCHER.

that has been represented as most dangerous; and too delicate a Discretion to be entrusted; and it is, I agree, a very delicate Discretion: but then I am at a Loss to say, these Powers are not frequently created for the very Purpose of giving the Parent Controul over the Child: a Bridle upon the Conduct of the Child, according to the Language of some Cases; and if these *Dicta* have any Foundation in Reason, it is extraordinary to say, the Power is given as a Bridle upon the Conduct of the Child: and yet the Conduct of the Child shall not be a Circumstance, regulating the Conduct of the Parent.

I do not pursue the Variety of other Contradictions, that may be pointed out: but will notice one, of some Importance. It is said universally, and cannot be controverted, that any of these Appointments, under which each of the Objects has some Share, is good at Law: but that, where that Share is illusory, that is a Fraud upon the Power; and must be dealt with accordingly in this Court. Some Judges have said, and the *Master of the Rolls* in his very able Judgment, (which cannot be read without the Observation, that it is a most able Exposition of his Sentiments) grounds one of his Difficulties upon this, that a Deed cannot be fraudulent, unless it is fraudulent both in Law and Equity; that the Question of Fraud is the same in the one Court as in the other. To that Doctrine I do not agree. Though in modern Times, and particularly during the Period, in which I have been engaged in this Hall, a strong Inclination has been evident to say, that whatever is Equity ought to be Law; an Opinion, acted upon especially by Mr. Justice *Buller*; who persuaded Lord *Mansfield* to act upon it, until it was reformed by Lord *Kenyon*, with the Assistance of the same very able Judge, as he certainly was; yet the clear Doctrine of Lord *Hardwicke* and all his Predecessors was, that there were many Instances of Fraud, that would affect Instruments in Equity; of which the

Distinction as to Fraud in Equity and at Law.

the Law could not take Notice: and this Class of Cases is one Instance.

Without going through all the Cases upon this Subject it will be sufficient to name the late Cases in which the whole Subject is exhausted; all the Contradictions, both of *Dicta* and Decisions, are noticed; and all the Cases referred to; with particular Citations, collected from the most authentic Accounts of them: *Pocklington* v. *Bayne* (*a*), before Lord *Thurlow*; who decided in a very short way, which was not his Habit, that an Appointment of One Acre for Life was illusory: *Bristow* v. *Warde* (*b*). *Vanderzee* v. *Acloin* (*c*). *Kemp* v. *Kemp* (*d*). *Mocata* v. *Lousada* (*e*). *Dyke* v. *Sylvester* (*f*); and *Bax* v. *Whitbread* (*g*).

It is unnecessary to detail very particularly the Circumstances of the present Case; which is in Print. The short Result is, that this Lady, having married against the Wishes of her Father, who created a Trust as to the whole of his Property in Mr. *Pickering* and Mr. *Partington*, had a Power to give a Freehold Estate to any of her Children after her Death; whether that would extend to Children by any other Husband, is immaterial. She had also a Power to give £4000 to any Person she might think fit immediately; a farther Power to appoint £6000 with some Household Furniture to any Person; of course including her Husband and Children: and in Default of Appointment that Sum would vest in her. The Residue she was to have for her Life; and at her Death she had a Power to appoint it among her Children: but, in

(*a*) 1 *Bro.* C. C. 450.
(*b*) 2 *Ves.* 336.
(*c*) 4 *Ves.* 771.
(*d*) 5 *Ves.* 849.
(*e*) 12 *Ves.* 123.
(*f*) 12 *Ves.* 126.
(*g*) 10 *Ves.* 31. 16 *Ves.* 15.

1812. BUTCHER v. BUTCHER, GOODAY v. BUTCHER.

Addition to that, as large a Power as possible, from Time to Time, and by Deed, to appoint any Part from Time to Time to any Child, as she should think fit; and, in Default of such Appointments from Time to Time and at her Death, the Value was to go among the Children equally. Then follows a very important Clause; contemplating the Event of another Marriage; and providing, that nothing in this Settlement shall authorise her to give to the Children of any other Husband more than a Moiety of that Residue, over which her Power extended.

The Effect is, that, as the Children came into Existence, the Shares vested, subject to be varied by the Births of future Children, and the Exercise of her Power: regulated only by this; that the Children or Child of a future Marriage should not have more, but might have as much as one Moiety. She did exercise her Power to appoint from Time to Time during her Life: the first Appointment taking the Share appointed out of the Subject of the Power; and leaving the Remainder to be appointed among the Children; including the Child, in whose Favor the Power had been executed, and the Children of a future Marriage: which Child, for whom that Appointment was made, might in the Event of another Marriage take, besides the Share appointed, one Moiety of the whole. This was followed by subsequent Executions of the Power from Time to Time: every Appointment taking out of the general Subject of the Power so much; and leaving the Residue vested, and to vest, in the remaining and future Children: the Number incapable of being ascertained, until she reached an Age, at which she could not have more; and if there had been one Child by a subsequent Marriage, after all these particular Appointments, that Child might have taken a Moiety of what constituted the whole Fund before any Appointment; though that should leave to

perhaps

1812.

BUTCHER v. BUTCHER.

GOODAY v. BUTCHER.

perhaps Twenty Children of the former Marriage only their respective Shares of what remained unappointed.

It is evident, how immensely large a Discretion was given; and to what the Fund might by repeated Executions of the Power be reduced; and this goes far to shew, that her Discretion must, as far as it can in any Case, be unfettered. The Consequence is, that this Fund, which was the Subject of these Powers, became reduced to the Subject of the last Appointment. With regard to that it is clear, that, if the last Appointment could not be maintained, that would by no Means shake any of the former Appointments.

A Circumstance exists in this Case with regard to one of the Children, which I mark very particularly. When this Court takes upon itself to judge, whether these Powers are, or are not, well executed, if given to Parents in Settlements with any of the Views I have mentioned, to be regulated by the Conduct, State, and Circumstances of the Children, this is a Circumstance we know better how to deal with than many, that might occur in the State of Families; with reference to which such Questions arise. This Child was a Lunatic; and a very large Provision is made for her. Considering this Subject unprejudiced by Decision, I cannot help saying, that, if, with such a Power, I had a Son, well provided for, embarked, for Instance, in this Profession, and rising in his Circumstances, and a Daughter in this deplorable Situation, great Inequality would not appear to me to be Injustice. It is farther obvious in Experience, that a large Provision, made for One Child, may be the best thing possible for another: but, I agree, the Court has not trusted itself with such Considerations.

The Question is then reduced to this; whether, as

1812.
BUTCHER
v.
BUTCHER.
GOODAY
v.
BUTCHER.

Lord *Alvanley* said as to £10, refusing to say it as to £50, I can say upon the last Appointment, that, as this is a Power, coupled with the Execution of a Trust, recollecting always, that it must be considered with reference to the Nature of the Trust, to be collected from the whole of the Instrument, the Shares, given to Mrs. *Gooday* and the other Children, are not substantial; not now attending to the Circumstance, that there is an Excess in the Execution of the Power by giving to Grand-children; which must be divided among all; as in Default of Appointment. I concur with the *Master of the Rolls*, that the recent Cases reduced the Question to this: whether attending to all the Circumstances, and the Nature of the Trust, collected from the Deed, the Court can take upon itself to say, the Share is not substantial; that I am not authorised to say so in this Case; and therefore avowiug the great Difficulty, in which the Court is placed upon this Subject, I cannot say, that this Decree ought to be reversed: and consequently it must be affirmed.

ROLLS.
1812,
Nov. 12. 17.

WADESON *v.* RICHARDSON.

Construction of Deeds: First, that a Provision for Payment of "the just Proportion or "Share" of all Debts, owing from one Partner jointly and as a Partner, referred, not to the Contribution as among the Partners, but to what with reference to the State of the Partnership Funds, and the Ability of the other Partners he may eventually be called on to contribute to the joint Debts; so as they may be fully paid: Secondly, that under a Provision for Debts of various Descriptions no Preference was intended; which must be clearly shewn: otherwise the Court favors equal Payment: Thirdly, a Reference to a Deed of a special Date, there being Two of the same Date, One executed at that Time, the other subsequently, was in the Absence of positive Evidence, and aided by Circumstances, applied to the former.

BY Indenture, dated the 16th of *September*, 1801, reciting, that *Thomas Simpson* was indebted, in his separate Capacity, to the late House of *Simpson* and *Wetherell*; in which *Simpson* was a Partner; and was also indebted, in his separate Capacity, to the Banking-house of *Simpson*, *Taylerson*, *Saunderson*, and *Granger*; and likewise to the several Persons, mentioned in a Schedule; and that he was desirous of making a Provision for the Payment of the said several Debts; and also reciting Three several Indentures of Lease and Release, the Releases bearing Date with the present Indenture, each of which Releases contained a Declaration, that the Hereditaments therein comprised were conveyed, in Trust for Sale; in order to discharge the Mortgages and Incumbrances according to their Priorities, and as to the Residue upon the Trusts expressed and declared by an Indenture, intended to bear even Date with the said Indentures of Release; it was declared, that the Trustees should stand possessed of, and interested in such Residue, in Trust, in the first Place, thereout to pay the Costs of that Indenture, and of all other Deeds, connected therewith, and of the Trustees; and, "in the next Place," to pay to the then late Co-partnership of *Simpson* and *Wetherell* a certain Sum, due from *Thomas Simpson* in his

1812.

WADESON v. RICHARDSON.

his separate Capacity: "and also" to pay to the Co-partnership of *Simpson, Taylerson, Saunderson,* and *Granger,* all such Sums of Money as then were, or thereafter should appear to be, owing from the said *Thomas Simpson,* in his separate Capacity, to them, as Bankers, and Co-partners; and also thereout to pay the just Proportion or Share of him the said *Simpson* of all such Debts as were, or should thereafter appear to be, owing from him *Simpson* jointly, and as a Co-partner with *Taylerson, Saunderson,* and *Granger,* as Bankers, to any Persons, to whom they were, or might be, indebted: and also, the Proportion or Share of *Simpson* for the Losses of the Co-partnership; and also to pay the several and respective Persons, mentioned in the Schedule thereto, the several Debts, therein specified, and to them owing from *Simpson,* rateably and in equal Proportions, with Interest; and as to the ultimate Surplus, if any, to *Simpson,* his Executors, Administrators, and Assigns.

By another Indenture, dated the same 16th of *September,* 1801, made between the said Parties, and professedly for the same Object, namely, to declare the Trusts of such Residue, the Trusts are declared precisely the same; with this important Difference; that the Trust for the Payment of the separate scheduled Creditors of *Simpson,* instead of following, precedes, the Trust for the Payment to the Partnership of *Simpson, Taylerson, Saunderson,* and *Granger,* of such Debt as was due to that Partnership from *Simpson* in his separate Capacity.

The first of these Deeds, in the Order in which they are here stated, was executed on the Day it bore Date: the second was not executed until the 12th of *December,* 1801. With the Exception of three additional Creditors, named in the Schedule of the second Indenture of *September,*

ber, 1801, the Schedules, annexed to each of those Indentures, contained the sames Names. *Cobb*, one of those additional Creditors, was by a Deed, dated the 12th of *December*, 1801, substituted for one of the original Trustees; and by another Indenture, dated the same 12th of *December*, 1801, *Simpson* granted to those Trustees, including *Cobb*, certain Property for Ninety-nine Years; in Trust, (after paying their Expences as Trustees), in case the Fund "in and by a certain Indenture, bearing Date the 16th "Day of *September* then last past, and made between "*Simpson* of the one Part, and *Richardson*, *Barker*, and "*Richardson*, of the one Part, appointed for satisfying "the several Mortgages, and Debts therein mentioned, "and referred to," should by any Means, become deficient for that Purpose, to raise and levy such Sums of Money as should be sufficient to answer and make good such Deficiency; and to pay and apply the Money, so to be raised, for the answering and making good such Deficiency accordingly.

In *May*, 1802, *Simpson*, *Taylerson*, *Saunderson*, and *Granger*, became Bankrupts.

The Trustees had upwards of Ten Thousand Pounds in their Hands; Part of the Trust Monies, under the Deeds of *September*, 1801; and Two Thousand Pounds, arising by the Sale of the Term of Ninety-nine Years. A Dividend of Five and Sixpence in the Pound had been paid under the Commission of *Simpson*, *Taylerson*, and *Saunderson*, and *Granger*. The whole of the Debt, due from *Simpson* in his separate Capacity to the Partnership of *Simpson* and *Wetberell*, had been paid.

The Bill was filed by a Creditor of the Firm of *Simpson*, *Taylerson*, *Saunderson*, and *Granger*; praying, that the several Trusts of the first-mentioned Indenture of the

16th

1812. WADDISON *v.* RICHARDSON.

16th of *September*, 1801, may be carried into Execution; that he may be paid the Residue of the Debt, due to him at the Execution of that Indenture from the Co-partnership of *Simpson*, *Taylerson*, *Saunderson*, and *Granger*; that the Trusts of that Indenture for Payment of the Debts, due from *Simpson* jointly and as a Co-partner, may be preferred to the Trusts, by the same Indenture declared for Payment of the Debts, mentioned in the Schedule thereto; that the Trusts of the second Indenture of *September*, 1801, may be postponed to those of the first; that the Trusts of the Indenture of the 12th of *December*, 1801, may be carried into Execution; that it may be declared, that the first-mentioned Indenture of *September*, 1801, is the Indenture referred to in that of the 12th of *December*, 1801; and that the Fund, raised by that Indenture, may be applied accordingly.

Sir *Samuel Romilly*, and Mr. *Wear*, for the Plaintiff.

The first Question, which arises in this Case, is, which of the Deeds of the 16th of *September* is meant to be referred to by the Deed of the 12th of *December*. The Moment the first Deed was executed, it took from *Simpson* all Power of future Disposition; a Deed having Effect from the Delivery; not from the Date. Therefore, a Deed, bearing Date the Day, on which it is executed, must prevail against a Deed, executed on a subsequent Day; though bearing the same Date.

The next Question is, what is meant by the "just Proportion" of *Simpson's* Debts. His just Proportion of the Debts due to the Creditors, is all, that has not been paid by the Funds of the Co-partnership; and, applying that to the Circumstances of this Case, all, that remains after Payment of the Five Shillings and Sixpence in the Pound, received under the Bankruptcy, is the just Proportion to be answered by this Trust.

Mr.

Mr. *Leach*, and Mr. *Horne*, for the scheduled Creditors.

The Words "just Proportion" must be refered to *Simpson* and his Partners; meaning a Provision for what was justly his individual Part of the Debts; namely, a Fourth. There is another Point for Consideration; though not made by the Pleadings; whether there is a Priority to any, but the first mentioned, Creditors. The Words of the Deed give no such Priority; but, after the first Provision, all the rest take rateably, and *pari passu*. The Deed of the 12th *December* brings forward new Property, in Aid of the previously existing Funds: and whatever may be the technical reasoning resorted to, there can be no Doubt of the Intention of the Parties. The Words "in the next Place," in the first Deed of the 16th of *September*, apply, not only to *Wetherell's* Debt, but to the Debts following; connected, as they are, by the Words "and also."

Mr. *Hart*, for the Assignee under the Commission.

The Recital, in the Deed of the 16th of *September*, is material; shewing, that the principal View, that *Simpson* had in making that Deed, was the Discharge of what he owed his Partners; the Contract being, not with the Creditors, but with his Partners. With respect indeed to the Creditors, he owed the entire Sum, and he had no Right to settle the Proportion he would pay. The true Construction is his just Proportion, as a Partner.

Mr. *Richards*, and Mr. *Utterson*, for the Creditors, named only in the Schedule to the second Deed of *September*, 1801.

The Deed of the 12th of *December* introduces new Property, and disposes of it according to the Trusts of a Deed

1812.

WADESON v. RICHARDSON.

Deed of the 16th of *September*; and, although, it is true, a Deed has no Effect until executed, the Deed of the 16th of *September*, which was executed on the 12th of *December*, under the Circumstances is the Deed referred to; the Provision for *Cobb's* Debt by that Deed affording conclusive Evidence of that.

Sir *Samuel Romilly* in Reply.

It is impossible to understand the Deed in the Sense contended for. From what follows, as to the separate Debts, it is clear, that they were to be paid in Succession; and the Terms "rateably, and in equal Proportions," mean, with each other, not with the Debts, previously provided for. The separate Debts alone are to carry Interest. The Intention, therefore, was to make a Gradation in the Payment of the Debts. As to the Terms "just Proportion," it is clear, he meant to provide for the Payment of all his Debts. He recites that Intention expressly: but, according to the Construction contended for, he would leave all his Co-partnership Debts beyond a Fourth, unpaid; being liable to the Creditors for the whole.

Upon the remaining Question, which of the Deeds of *September* is referred to, admitting there may be Reason to conclude, that the second Deed was intended, the Court must look not at the Circumstances but to the Rules of Law. If there be a valid Deed, and another Deed, which is inoperative, of the same Date, and a third Deed contains a general Reference to the Deed of that Date, the Court must presume, that the Reference is to the operative and valid Deed: that, which is truly of the Date, ascribed to it.

The

1812.

WADESON v. RICHARDSON.

Nov. 17.

The MASTER *of the* ROLLS.

There are Three Questions in this Cause: 1st. What is the Extent of the Provision, made by this Deed for the Partnership Creditors: 2dly. Whether they are to take that Provision, whatever it may be, in Priority to the separate, or scheduled, Creditors; or only *pari passu* with them: 3dly. What is the Trust of the Term, created by the Deed of the 12th of *December*.

The first of these Questions depends upon the Sense of the Words "just Proportion or Share," in the Clause of the Deed, speaking of the Debts, due by the Banking House, in which *Simpson*, the Maker, was a Partner. Those Words, as there used, cannot, I think, mean merely One-fourth of the Partnership Debts. In that Clause he is speaking, not of what may be due from himself to the Partnership; or what, as between him and his Partners, he might be bound to contribute to the Partnership Fund: but of what in consequence of his being a Partner he may owe to the Partnership Creditors. *Quoad* them his just Proportion is what, with reference to the State of the Partnership Funds, and the Ability of the other Partners, he may eventually be called on to contribute to the joint Debts: so as that all those Debts may be paid. If, for Instance, all the Partners had continued solvent, his just Proportion would have been One-fourth of the Debts; if one had been wholly insolvent, his just Proportion would be One-third. My Opinion is, that the Partnership Creditors are entitled to come in under the Deed for so much as shall not be paid out of the Partnership Funds, and as they cannot recover from the Estates of the other Partners.

Upon the second Question there does not appear to me to be enough in the Deed either to prefer or postpone any one Set of Creditors to another. The Expences of the

Trust

1812. WADESON v. RICHARDSON.

Trust are to be paid in the first Place: the Trustees are directed in the next Place out of the Fund to pay Debts of various Descriptions: but I do not see, how a Direction to pay in the next Place out of a given Fund a Debt to *A.*, and also thereout a Debt to *B.*, and also thereout a Debt to *C.*, can entitle *A.* to be preferred to *B.*, and *B.* to be preferred to *C.* According to the Words the one Debt is to be paid as well as the other: the one and also the other; and all out of the same Fund: the Word "thereout" referring to the Fund, originally spoken of, before any of these Classes of Creditors are described. The Declaration, that the separate and scheduled Creditors are to be paid rateably and in Proportion, to each other, is not of itself sufficient to prove, that they are not also to take rateably and in Proportion with the other Creditors. The Court always leans in Favour of equal Payment of all Debts: an Intention of Preference must therefore be clearly shewn; especially, where, according to the Construction contended for, the separate Creditors would be postponed in the Distribution of the separate Estate of the Debtor.

As to the Words "ultimate Surplus" they are properly referable to that other Surplus, previously spoken of, as constituted by the Payment of those Debts, that were Incumbrances upon the different Parts of the Estate, conveyed to the Trustees. Out of that the joint and separate Creditors are to be paid; and the ultimate Surplus is to go to the Maker of the Deed; but there is nothing which implies, that a second Set of Creditors are to be paid out of the Surplus, constituted by Payment of the First; and a Third out of the Surplus, constituted by Payment of the Second.

As to the third Question, there being Two Deeds, equally bearing Date on the 16th of *September*, it is first to be seen, whether the Deed of the 12th of *December* contains

contains in itself any thing, shewing with sufficient Precision, to which of those it was intended to refer. The only Circumstance upon the Face of the latter Deed, that was relied on, as connecting it with the second of those Deeds, is, that *Cobb* is appointed one of the Trustees of the Term. If there had been a Reference to this previous Appointment to be a Trustee of the other Property, that would have been material; as it is clear, he was appointed such Trustee with reference to the second Deed of that Date. There is, however, no Reference whatsoever to his Appointment as a Trustee of any other Property; though the Fact appears, that he was so. The bare Circumstance of his being appointed a Trustee of this Term, may furnish a Ground of Conjecture as to the Reason and Purpose of his Appointment; but there is nothing decisive in it; for this new Trust might be vested in different Persons: though for the same Purposes as the first. Here *Simpson*, the Maker, has created the Ambiguity by giving the same Date to different Instruments; truly dating one, and falsely the other, as of the 16th of *September*. When he refers to a Deed of that Date, as if there was only one, must it not in the Absence of positive Evidence to the contrary be held, that he must mean the Deed, really executed on that Day; rather than a Deed, having no Existence at that Time; but to which such Date was afterwards improperly and fraudently given?

That is not however the sole Consideration, applicable to the Question. The Court will endeavour to give some Effect to this Deed. It is supplementary to another Deed: to make good the Deficiency, if any, of a Fund, provided by that other Deed for the Payment of his Debts. It must remain wholly inoperative; unless it can be connected with the first Deed. As *Simpson* could not revoke or alter any of the Trusts he had first created for Creditors, it is admitted, that it is under the first Deed

that

1812.
WADESON
v.
RICHARDSON.

that the Property must be administered. The last Deed providing an auxiliary Fund: must be a Nullity; unless it can be connected with the Deed, by which the principal Fund was created. The Sufficiency or Insufficiency, of the principal Fund never can be ascertained with reference to the second Deed of the 16th of *September*, as the Property is not to be applied under or according to the Directions of that Deed. It was said, that there was a possible Case, in which it might have an Operation: viz: if all the Purposes of the first were answered; but that is to suppose a Case, in which the present Controversy could have no Existence. If all the Purposes of the first Deed were answered, the Creditors under it would have nothing to claim under the last; which only provides for a supposed Deficiency. It would in that Case be immaterial to them, whether the Creditors under the second could or could not sustain any Claim. But there is a Deficiency to satisfy the Creditors under the first Deed. The second, consequently, has no Operation. I am therefore of Opinion, that the Creditors under the first Deed have a Right to the Benefit of the auxiliary Fund, created by the Deed of the 12th of *December*.

1812.
Aug. 18.
Dec. 11.

HALL, *Ex parte.*

A Settlement, after a Marriage in *Scotland*, not supported against Creditors in Bankruptcy, as upon valuable Consideration, by a Re-celebration of the Marriage in *England*: but it was sustained as the Consideration of an Agreement to settle by the Parent of the other Party.

IN *November* 1807 *William Henry Hall*, then an Infant, eloped with *Harriet Dickinson*, also an Infant, to *Scotland*; where on the 11th they were, without the

Consent

1812.
HALL,
Ex parte.

Consent of their Fathers, married according to the Laws of *Scotland.* Shortly afterwards *William Dickinson*, the Wife's Father, proposed so *Thomas Hall*, the Husband's Father, that the Marriage should be re-celebrated according to the Rites of the Church of *England*, and that some Settlement or Provision should be made for the Benefit of the Husband and his Wife. In answer to this Communication *Thomas Hall* proposed, that he would settle at least £200 upon his Son, for every £100, which *William Dickinson* would settle upon his Daughter.

On the 9th of *December*, 1807, the Marriage was re-celebrated in *England*; and *William Dickinson* by his Bond of that Date, reciting the previous Marriage, in consideration of the Obligor's natural Love and Affection for his Daughter, and in order to make some Provision for her Maintenance during his Life, and in consideration also of the Marriage between her and *William Henry Hall*, and also of a Contract entered into by *William Dickinson*, previous to the Solemnization of the Marriage in *England*, secured an Annuity of £105 to the Use of *Harriet*, the Wife of *William Henry Hall*, during the Obligor's Life, or until she should come into Possession of a principal Sum, secured by her Parent's Marriage Settlement; the Interest of which was equal to the Annuity. In consideration of this Act on the Part of the Wife's Father *Thomas Hall* previously to the Re-celebration of the Marriage agreed to settle the Sum of £300 *per Annum* on his Son for Life. This Sum had been regularly paid; and was secured on real Estates, belonging to *Thomas Hall.* When *Dickinson* entered into the Bond, he was solvent; and so continued for some Years afterwards; and the Annuity of £105 was regularly paid by him until the Month of *December* 1808. On the 10th of *August*, 1809, a joint Commission of Bankruptcy having issued against *William Dickinson* and *Roger Pocklington*, as

1812.

HALL, *Ex parte.*

Bankers, a Petition was presented by *William Henry Hall* and his Wife to prove under the Commission against the separate Estate of *William Dickinson* for the Value of the Annuity.

Mr. *Hart*, and Mr. *Horne*, in support of the Petition.

The Lord CHANCELLOR declared his Opinion, that, the Settlement after the Marriage in *Scotland* not being ante-nuptial, the Re-celebration of the Marriage in *England* could not support the Bond, as given for a valuable Consideration: but, if *Hall's* Father agreed to make a Provision for his Son at the Time that Bond was given, or in consideration of that Bond, previously to the Bankruptcy, that Agreement would sustain the Bond; though the Provision was not in fact made by *Hall's* Father until after the Bankruptcy.

The Fact, that the Bond was given in Consideration of the Agreement by *Hall's* Father to allow him £300 a Year, being established by a farther Affidavit, the Order was made according to the Prayer of the Petition.

ROLLS.
1812.
Nov. 17. 19.

LINGARD *v.* BROMLEY.

Contribution enforced among Assignees in Bankruptcy to reimburse a Payment by one under an Order for a Loss, occasioned by their Joint Act; and the Objection, that the Defendants acted only for Conformity upon the Representation and Advice of the Plaintiff, did not prevail.

IN 1805 a Commission of Bankruptcy issued against *Ralph Ogden*; and the Plaintiff and Defendants were chosen Assignees under it. The Commissioners at the Instance of Mortgagees for £2324 caused the mortgaged

Premises

Premises to be put up to Sale; which produced the Sum of £3400. The Assignees, conceiving, that the Commission could not be supported, and that the Mortgage was invalid, declined to join in the Conveyance to the Purchaser. Upon the Petition of the Mortgagees, that the Assignees might be compelled to join in the Conveyance, or that a Re-sale might be ordered, the Assignees making good the Deficiency, if any, the Assignees were directed to concur in the Sale; with Liberty to present a Petition to dispute the Validity of the Mortgage. An Order for a Re-sale was afterwards obtained; which Sale produced only £2820; and under another Petition by the Mortgagees the Assignees were ordered to pay the Deficiency of £580, with Interest and Costs; amounting to £1139: 11s: 9d.; which Sum was paid by the Plaintiff; the Defendants having been committed for not paying according to that Order. The Bill prayed an Account and Contribution.

The Defence, set up by the Answers, was, that the Plaintiff acted principally in the Bankruptcy: the Defendants relying on his Representations and Advice; and concurring only in Form; and Evidence was produced of the Plaintiff's Declarations, that he would take the Management of the Law Business upon himself; and, on one of the Defendants observing, that they wished to have nothing to do with Law, that he would bear them harmless, &c.

Sir *Samuel Romilly*, and Mr. *Agar*, for the Plaintiff.

The Court is in the Habit of decreeing Contribution and Average between Persons, one of whom has paid the Debt of all; and that Principle applies here; no one of these Persons having a greater Interest than another. The modern Cases on this Head are but few; the Principle being universally admitted; but it was formerly much

acted

1812.

LINGARD v. BROMLEY.

acted upon (a). The Effect of refusing Contribution, leaving one Party, who had paid the whole, without Remedy, would be the greatest Injustice. Though the Plaintiff took the active Part, they all signed the Petitions.

Mr. *Leach*, and Mr. *Wingfield*, for the Defendants.

The Proposition, that Contribution and Average constitute a common Head of Equity, where the Demand arises out of Contract, cannot be disputed: but its Application is denied, where a Party is charged with respect to a Tort.

Sir *Samuel Romilly*, in Reply.

If this Case is to be determined upon the Distinction between Tort and Contract, the Consequences will be most prejudicial. In Equity there is no such Distinction: Torts being only known at Law. Suppose a Breach of Trust, committed by one Trustee, selling out Stock, receiving the Amount, and persuading his Co-trustee to join him: In Justice the one receiving ought to pay: but the Decree is against both; and according to this Doctrine, if Payment were enforced against him, who received nothing, there could be no Contribution. If one Trustee by acting and giving Advice to another loses his Right to Contribution, the Effect would be a Premium to Trustees to be idle; as the most active would incur the Responsibility.

The MASTER *of the* ROLLS.

Nov. 19.

The first Defence made in this Case seems to me to be quite untenable. Where entire Damages are recovered

(a) See 1 Eq. Ca. Abr. *Mackworth*, *Bunb.* Rep. 138. 113, (Ed. 1739) *Lloyd* v.

against

1812. LINGARD v. BROMLEY.

No Contribution between Wrong-doers upon entire Damages for a Tort.

against several Defendants guilty of a Tort, a Court of Justice will not interfere to enforce Contribution among the Wrong-doers; but here is nothing but the Non-performance of a civil Obligation. The *Lord Chancellor* held, in the first Place, that the Assignees were bound to convey; and secondly, that, a Loss being occasioned by their not having conveyed, they were bound to make good that Loss, with the Costs, arising by their Refusal. The Liability therefore is not at all *ex Delicto*; unless every Refusal to comply with a legal Obligation makes a Party guilty of a *Delictum*. As to the second Defence, there are, no Doubt, many Cases, in which Persons may be all liable, severally as well as jointly, to indemnify a third Party; and yet ought not in Equity to bear the Burthen equally among themselves. But what are the Circumstances of Distinction between these Persons? It is not alledged, that the Plaintiff derived any exclusive Benefit from the Acts, in which he concurred with the Defendants. Their Refusal produced Loss to others; but no Advantage either to him or them. The Defence is of a Kind, which a Court of Justice is very unwilling to listen to; that, having undertaken a Trust, they abdicated all Judgment of their own in the Performance of it; and did whatever the Plaintiff desired: "without examining," (as they say in so many Words) "into the Matter, or Ground, of the Proceeding." Nothing could be more mischievous than to hold, that Trustees may thus act; and avoid Responsibility by throwing the Burthen upon the Person, in whom they have reposed this blind Confidence. The Case is not, that they abstain merely from interfering; but they enter upon the Trust; make themselves Parties to every Proceeding; give the Sanction of their Names to each Transaction; and now say, they are to be considered as total Strangers; and all, that has been done, is to be taken as the Act only of their Co-trustee. If this will do to protect them from Contribution, why would it not be sufficient to throw back

1812. LINGARD v. BROMLEY.

the Burthen upon the Plaintiff, if the Defendants had been the Persons called upon to pay in the first Instance? It was at first a voluntary Act in them to take the Judgment of the Plaintiff, as a Guide for theirs. There is nothing to shew, that he fraudulently professed that to be his Judgment, which really was not such. He thought, there were Acts of Bankruptcies, prior to the Mortgage, that would invalidate it; and conceived, that the Assignees ought not to convey to a Purchaser under a Sale, procured by the Mortgagees. The Defendants say in their Answer, they now believe, there were such Acts of Bankruptcy. Then one does not see, why it should require much Persuasion to induce them to take the Chance of being able to prove what they believed to exist, and which, if proved, would have been highly beneficial to the general Creditors. I see nothing sufficient to exempt them from the Liability to answer for Acts, in which they joined; and to enable them to throw the whole Responsibility for those Acts upon the Plaintiff. He is therefore entitled to the Contribution he prays, with the Costs of the Suit.

ROLLS. 1812, *Nov.* 16. 19.

LEE *v.* MUGGERIDGE.

Under a Settlement in Trust to pay the Rents and Interest to the separate Use for the joint Lives of Husband and Wife, if she survived, for her Heirs and Executors: if he survived, according to her Appointment by Will; in Default thereof a Limitation over as to the real Estate, and, as to the personal, to her Executors, the Wife cannot, during the Coverture, bind the Capital, surviving to her.

As to the Effect of her subsequent Undertaking, when sole, to pay her Bond, given during Coverture, the Creditor was left to Law.

BY Indenture, dated the 21st of *November*, 1789, previous to the Marriage of *John Muggeridge* and *Mary Hiller*, a Messuage, of which *Mary Hiller*

was

was seised in Fee, was settled, to the Use, after the Marriage, of Trustees and their Heirs, during the joint Lives of *John Muggeridge* and *Mary Hiller*; upon Trust, to pay the Rents, Issues, and Profits, to *Mary Hiller*, or to such Persons, as she by Writing should direct to receive the same, during the joint Lives of *John Muggeridge* and *Mary Hiller*, for her sole and separate Use; and from and immediately after the Decease of *John Muggeridge*, in case the said *Mary Hiller* should survive him, to the Use of *Mary Hiller*, her Heirs and Assigns for ever; but in case she should die in the Life-time of *John Muggeridge*, then to the Use of such Persons, for such Estates, and charged, as *Mary Hiller* by her last Will and Testament in Writing, or by any Writing in the Nature of, or purporting to be her last Will and Testament, executed in the Presence of Three Witnesses, should direct, limit, or appoint: and in Default thereof, to the Use of *Hannah Hiller*, her Heirs or Assigns for ever.

The Settlement contained a Power of Sale; the Money arising therefrom, to be settled to the same Trusts; and as to certain Stock and Funds, to which *Mary Hiller* was entitled, and which had been transferred to the same Trustees, it was declared, that the Trustees should stand possessed thereof, in Trust, after the Marriage, to pay and apply the Interest, Dividends, and annual Produce, thereof to *Mary Hiller*, during the joint Lives of herself and *John Muggeridge*, for her sole and separate Use, exclusive of him, and not to be subject to his Debts, or Controul: and from and after the Death of *John Muggeridge*, in case *Mary Hiller* should survive him, then, upon Trust for *Mary Hiller*, her Executors, Administrators and Assigns; but, in case *Mary Hiller* should die in the Life-time of *John Muggeridge*, upon Trust, after the Decease of *Mary Hiller*, to assign and transfer the several and respective Funds, to such Persons, in such

1812. LEE v. MUGGERIDGE.

Shares, and subject, as *Mary Miller*, notwithstanding her Coverture, by her last Will and Testament in Writing, or by any Writing in the Nature of, or purporting to be, her last Will and Testament, should limit, or appoint: and in Default thereof, upon Trust to pay, transfer, and assign, the same unto *Mary Hiller* her Executors, Administrators, and Assigns, for her and their own proper Use and Benefit.

In 1799 *Joseph Hiller* the Son of Mrs. *Muggeridge* by a former Husband, from whom she derived her Property, falling into embarrassed Circumstances, she, in order to induce the Plaintiff, his Father-in-law, to relieve him, proposed by Letter to become Security to the Extent of £2000 by a Bond, payable at her Death. The Plaintiff accordingly advanced the Money to *Joseph Hiller*; and Mrs. *Muggeridge* by her Bond, dated the 4th of *August* 1799, became bound to the Plaintiff for £4000, with Condition, that the Heirs, Executors, or Administrators, of Mrs. *Muggeridge* should, within Six Months after her Decease, pay to the Plaintiff £1999: 19*s.* with such Part of the Interest as *Joseph Hiller* should omit to pay; it being agreed that he should pay the Interest Half-yearly. *Joseph Hiller* having neglected to pay the Interest, the Plaintiff, in the Year 1804, wrote to Mrs. *Muggeridge*; requesting Payment of the Arrears; to which she, after her Husband's Death, returned an Answer, stating, that it was not in her Power to pay the Bond off; and that it would be paid by her Executors.

Mrs. *Muggeridge* died in 1811.

The Bill, filed against the Devisee and Executors, prayed, that the Bond might be declared a Charge on, and be paid out of, her separate Estate.

Mr. *Hollist*, Mr. *Leach*, and Mr. *Newland*, for the Plaintiff.

The

1812.
Lee
v.
Muggeridge.

The Contract with this married Woman was perfectly fair; arising from her own Application; and the most meritorious Motives. The Doctrine, that a married Woman, having separate Property, has a Right to dispose of it, is as old as Lord *Hardwicke's* Time; and has been recognized in modern Cases. *Heatley* v. *Thomas* (a) is precisely in point. The only Question is, whether the Wife had separate Estate; and, if there can be any Doubt upon that, her Conduct on the Application, made to her after her Husband's Death, would make her Estate liable. Supposing, that having no separate Estate, she was not bound by the Bond, executed during Coverture, her Promise, after the Coverture determined, would bind her; as in the Case of an Infant, promising after the Infancy is at an End; a Bankrupt, after his Certificate obtained; or a Debtor, protected by the Statute of Limitations. In this Case, however, the Wife had separate Estate; to create which no particular Form of Words is required: it is sufficient, that the Husband can only take under the Appointment of the Wife. Trying the Case by that Rule, this Property must be considered as the separate Estate of Mrs. *Muggeridge*; and to separate Property the Power of Disposition is incidental: *Fettiplace* v. *Gorges* (b).

Sir *Samuel Romilly*, Mr. *Hart*, and Mr. *Utterson*, for the Defendants.

If the Plaintiff can establish, that Mrs. *Muggeridge* had separate Property, then under the Authority of *Peacock* v. *Monk* (c), *Hulme* v. *Tenant* (d), and other Cases of that Class, he must recover; but the Rents and Interest only are settled to her separate Use, for the joint Lives of her and her Husband: not the Capital of her Estate,

(a) 15 *Ves.* 596.

(b) 3 *Bro. C. C.* 8. 1 *Ves. jun.* 46.

(c) 2 *Ves.* 190.

(d) 1 *Bro. C. C.* 16.

which

1812. Lee v. Muggeridge.

which is left subject only to her Appointment by Will; of which therefore she could make no Disposition by Deed in her Husband's Life (*a*). The Case of *Heatley* v. *Thomas* has no Application: the whole Property was vested solely in the married Woman; who could, therefore, immediately after the Execution of the Settlement have disposed of it by Deed: no such Power existing in this Case. It is not material, how the Debt, which has given rise to this Suit was contracted; since it was not competent to Mrs. *Muggeridge*, to undertake to pay; being a *Feme Covert*, and having no separate Property; her Bond was a mere Nullity; incapable of Confirmation after the Coverture determined. The equitable Relief, given in these Cases, is always commensurate to the separate Estate, or the Nature and Extent of the Power. This Instrument can never be considered as an Exercise of the Power of Appointment, actually reserved to her. The late Cases, *Hulme* v. *Tenant*, *Nantes* v. *Corrock* (*b*), and *Sockett* v. *Wray* (*c*), establish, that the Power must be pursued; and this Settlement prescribes one Mode, and one Mode only, of exercising it; and not being so exercised, the Consequence is, that the Property survived to her under the ultimate Limitation. The Letter of *July*, 1804, cannot be a Confirmation of the Bond: nor can it amount to a Promise, upon which an *Assumpsit* could be maintained. A Court of Equity will not extend the Principle, upon which Relief has been given in these Cases.

The MASTER *of the* ROLLS.

Nov. 19. Whether the Case of *Heatley* v. *Thomas* be well or ill decided, it has no Bearing upon the present. There was

(*a*) See *Anderson* v. *Dawson*, 15 *Ves.* 532.

(*b*) 9 *Ves.* 182.

(*c*) 4 *Bro. C. C.* 483.

a Declara-

a Declaration of Trust as to the whole Fund for the sole and separate Use of the Wife; not, as in this Case, as to the Interest only. It is true, there being an Agreement, that the Principal should remain in the Hands of *Willis*, he paying Interest for it, it was declared, that such Interest was to be paid into her proper Hands: but that was rather consequential to the former Declaration, than at all contradictory to it. There was not, as here, an express Provision, that in the Event of the Wife surviving the Property should be absolutely her's; which implies an Exclusion of a Power of so appointing it during the Coverture, as that it should not in that Event belong to her; and, farther, it was to be collected from the whole Instrument, that she was to have a Power, not only of appointing by Will, but of disposing of the Fund in any other Manner. There is therefore little or no Resemblance between the Two Settlements: but this Case falls precisely within the Decision of *Richards* v. *Chambers (a)*; where the Settlement was, at least in the Particular in question, precisely the same as this: in Trust for the sole and separate Use of the Wife for Life; and, if she survived her Husband, it was to be absolutely her's: if, she died in his Life, it was in Default of her Appointment to go to her Executors and Administrators. It is unnecessary for me to repeat the Reasons, upon which I held in that Case, that, where a married Woman expressly stipulates, that in the Event of her surviving the Property shall become her's, reserving no Power or Disposition over it during the Coverture, there are no Means, by which she can dispose of it, while she remains *Covert*.

Where a married Woman stipulates, that in the Event of her surviving the Property shall be her's, reserving no Power of Disposition over it during the Coverture, there are no Means, by which she can dispose of it, while *Covert*.

As therefore her direct Appointment could not affect this Property, *a fortiori* it cannot be affected by her Bond. As to what passed after the Death of the Husband, the Plaintiff must establish his Right at Law. If she has done

(a) 10 *Ves.* 580.

1812. LEE v. MUDGERIDGE.

done any thing, that sets up the Bond, or there has been a new Contract, her Assets will be liable: but I cannot now decree an Account against her Assets.

ROLLS. 1812. *Nov.* 19.

MEADOWS *v.* PARRY.

Limitation over after a Limitation, which never took Effect, established; not operating as a Condition precedent.

GEORGE *Meadows Parry* by his Will, dated the 9th of November, 1808, gave the Residue of his Estate to his Wife *Rebecca Parry*, and Two other Persons—"Upon Trust, that they do and shall apply the "Dividends and Interest of the said Securities, so to be "purchased, upon and for the Maintenance, cloathing, "educating, and placing out in the World, of all and "every such Child or Children, as I may happen to leave "at my Death, and born in due Time after, equally, "Share and Share alike, until they shall respectively attain "the Age of Twenty-one Years: then, upon Trust, to "pay, assign, and transfer, their Share of the Funds and "Securities, in which the same Residue shall have been "so invested, equally: and, in case any or every of the "said Children shall happen to die before Twenty-one, "such deceased Children's Share to go to the Survivor; "and, in case there shall be only one such Child, which "shall attain that Age, then in Trust to pay the same Re-"sidue to such only Child, as his, or her, own Property "for ever: but, in case it shall happen, that all of the "said Children shall die before attaining that Age, then "and in such Case I give and bequeath all such Residue "unto my said dear Wife *Rebecca Parry*, her Executors, "Administrators, and Assigns, for ever as her own sole "and absolute Property;" and the Testator appointed the Trustees joint Executors.

1812. MEADOWS v. PARRY.

The Testator having died without leaving, or ever having had, any Issue, a Bill was filed by the Plaintiff, as one of his next of Kin, against the Widow, for a Moiety of the Residue; insisting, that, as the Testator died without Issue, the Residue was distributable, as undisposed of by his Will.

Mr. *Leach*, and Mr. *Wingfield*, for the Plaintiff.

Mr. *Hart*, and Mr. *Roupell*, for the Defendant.

For the Plaintiff, it was submitted, that the Circumstance of the Testator's having Children by his Wife, and their all dying under Twenty-one, was a Condition precedent to entitle the Defendant, the Widow, to take the Residue: and, as the Testator never had any Children, she was not entitled to it. The Case of *Davis* v. *Norton* (a) was cited.

The MASTER *of the* ROLLS said, this Case could not be distinguished from those, in which, where a Testator devised to the Child, with which his wife was *ensient*, and if such Child died before Twenty-one, then over, the Devise over had been held to be good; though she proved not *ensient*.

The Bill was dismissed.

(a) 2 *P. Wms*, 390, *and* see Mr. *Cox's* Note. See also *Jones* v. *Westcomb*, 1 Eq. Ca. Abr. 245, pl. 10, *Statham* v. *Bell*, *Cowp.* 40, *Doe* v. *Brabant*, 3 *Bro. C. C.* 393.

COOKE

1812.
Nov. 20.

COOKE *v.* SETREE.

Though the Court will open a Solicitor's Bill, and order Taxation, after several Years, and a Security given, or even Payment, upon gross Errors, Fraud or undue Pressure, where nothing appeared but a trifling Inaccuracy, and under other favorable Circumstances, the Court would not restrain Proceeding upon a Security, obtained, while Business was depending.

THE Plaintiff employed the Defendant, and his late Partner *Smith* for some Years as her Attornies; during which they delivered Bills annually, and received from her divers Sums of Money.

Upon their Application the Plaintiff together with her Surety executed Two several Bonds. The Defendant having commenced Proceedings on those Bonds, the Plaintiff filed her Bill; alledging, that she had overpaid the Defendant; praying an Account, that the Bonds might be delivered up, and an Injunction. The common Injunction having issued, the Defendant applied to dissolve it.

Mr. *Heald*, for the Defendant.

Sir *Samuel Romilly*, and Mr. *Phillimore*, for the Plaintiff.

The following Authorities were referred to: Prac. Reg. (*a*), *Aubrey* v. *Popkin* (*b*), *Walmsley* v. *Booth* (*c*), *Drapers Company* v. *Davis* (*d*), *Langstaff* v. *Taylor* (*e*).

The Lord CHANCELLOR.

This Application is made upon general Principles, and also on special Grounds. As far as it proceeds upon general Principles, it is stated, that, generally, if an Attorney has received a Security, the Court will, as frequently has been done after actual Payment, order a Taxation of the Bill; and, supposing the Rule not to be

(*a*) 397.
(*b*) 1 *Dick.* Rep. 403.
(*c*) 2 *Atk.* 19.
(*d*) 2 *Atk.* 295.
(*e*) 14 *Ves.* 262.

so,

1812. COOKE v. SETREE.

so, generally, yet, where the Security has been received, not after the whole Business was concluded, but, while the Suit was going on, the Bill must be taxed. I will lay down the Rule as strong as any Judge; that there may be unquestionably that Sort of Pressure and Influence on the Part of a Solicitor over his Client, with regard to pecuniary Demand, against which the Court will give Protection; but that must not be carried too far; and for the Sake of Clients; with reference to whose Means of carrying on long and expensive Suits, in which they may be engaged, the Court must not so far interpose as to produce the Effect, that no professional Gentleman will undertake, or go through with, Causes. A temperate and just Consideration must therefore be applied to each Case. The Court may order Taxation, as Lord *Camden* did in the Case (*a*), referred to, after Eight Years, and Lord *Hardwicke* after Twenty-one, and an actual Security given; where the Court can see, that it was obtained by the undue Pressure of that Influence, which the Situation of Attorney gave; permitting the Security therefore to stand only for what is justly due. I go much farther; that after Security given, and even Payment, if the Client can point out in the Bill gross Errors, Charges, amounting to Imposition and Fraud, the Court will open the whole. Every Case however must be considered upon its own Circumstances.

In this Case Mr. *Smith* was the Attorney of Mrs. *Cooke* from the Year 1801 to 1803; when Mr. *Setree* came into Partnership with him. They delivered Bills annually: I will take them, (the Fact being disputed) not to have been signed Bills, upon which Actions might be brought; but intimating annually the State of their Demand upon her. They go on until 1808; and the Plaintiff became engaged in a Suit; of her probable Success in

(*a*) *Aubrey* v. *Popkin*, 1 *Dick.* 403.

which

1812. COOKE v. SETREE.

which *Smith* had a sanguine Opinion. *Setree* did not think so: but there is no Evidence before me, that he concealed his Opinion. The Suit proceeded; and it is not to be laid down, that a Solicitor is not to be paid, because he happens to be mistaken in his Opinion. In *Michaelmas* Term 1808 a Decree was pronounced against her by the Court of *Exchequer*: the Bill having been just before delivered; which I will suppose delivered at that Moment. An Arrangement was made as to that Bill: it was secured by a Bond; which was made the Subject of a Proceeding at Law; that has now reached a Writ of Error: and there is not stated to me one Charge, which can be considered as founded in Imposition, Fraud, or even Error. The Bill was reduced by this Species of Attention; observing, that a trifling Sum £.1 : 16s. was twice charged: a Circumstance, on which I lay no Stress; as the Person, observing that Inaccuracy, might not be a Judge, whether that Charge should ever have been made. It is not now established, that there is in this Bill any Item, that can be represented as Fraud, Imposition, or material Error; and it is properly stated in the Answer that there is scarcely an Instance of a Bill, in which some trifling Reduction may not be made; but it is impossible to hold that a Ground for putting it upon the Footing of improper Charge.

Is there then any Evidence of undue Pressure on the Situation and Feelings of the Client in obtaining this Security? I cannot go the Length of holding, that a Bond given in 1810, is to be complained of in 1812 upon the mere Ground, that there was not at the Time an End of all Business, depending between the Client and the Attorney, or of a particular Suit, in which they were engaged. It may be very fair as between them to say, that the Situation of the Attorney was such, that he could not go on; and therefore presented his Bill; desiring either Payment

1812. Cooke v. Setree.

Payment or Security in Part. This Case however goes farther. The Demand was due to two: one of them being the original Attorney of the Party; and it is also stated, that one Instalment was paid. Where there is no Fraud, Imposition, or Evidence of undue Pressure or Influence, and the Proceeding at Law has gone to Judgment and a Writ of Error, the Question is reduced to this: if there have been subsequent Dealings, in respect of which it can be made probable, that there has been any Receipt, that ought to be taken in Discharge of this Bond, that may form a Ground for Inquiry: but under all the Circumstances of this Case not without Payment into Court; and, as far as any thing has been read, I do not think the Plaintiff will make any thing of that Inquiry.

The Order was made for dissolving the Injunction.

Lincoln's Inn Hall 1812. *Dec.* 16.

HOWDEN *v.* ROGERS.

Writ of *Ne exeat Regno* granted against a Person, generally resident in *Ireland;* and in this Country only for a temporary Purpose; under the Circumstances, that a Balance was sworn to, for which Bail might have been had; that the Plaintiffs had filed a Bill in *Ireland,* where the Transactions arose, for an Account; and a Proposal of Reference.

The Writ discharged on giving Security.

THE Bill was filed by the Assignees under a Commission of Bankruptcy; praying an Account against the Defendants *Joyce* and *Rogers,* and the Writ of *Ne exeat Regno* against the latter; which was granted, marked for the Sum of £6000, upon Affidavit; stating that Sum to be due to the Bankrupts upon Balance of Accounts;

1812. HOWDEN v. ROGERS.

and Declarations of *Rogers*, that he intended to go to *Ireland* immediately.

A Motion was made, that the Writ may be discharged; and that the Defendant may be discharged out of the Custody of the Sheriff; upon Affidavit; stating, that the Defendant's Residence was at *New Ross* in *Ireland;* and he had no other Place of Residence whatever; that he had come to *England* to transact some necessary Affairs, relating to his Trade; and particularly to adjust the Account with the Plaintiffs; but in a few Days after his Arrival he was advised by his Partner, that the Plaintiffs had instituted a Suit in the Court of *Chancery* in *Ireland* against them relating to th Accounts; to which Suit the Defendant had directed an Appearance to be entered; and had since offered a Reference; which was refused; that, when arrested, he was about to return to *Ireland;* where his Connections and Business were; and otherwise had no Intention whatever directly or indirectly to leave the Kingdom.

Sir *Arthur Piggott*, in support of the Motion.

The Defendants are Merchants, residing in *Ireland;* carrying on general Business there; and the Transactions, from which the present Demand arose, took place in that Country; where a Suit is now depending for the same Purpose: on account of those Transactions. He is in this Country only for a temporary Purpose; proposes a Reference; and swears, that he has no Intention of quitting *Ireland*; which may be prevented by the Writ of *Ne exeat Regno,* issuing from the Court of *Chancery* in *Ireland.* The Application of this Writ to such a Case would be an Abuse of the Jurisdiction; and the Inconvenience enormous; if any *Irish* Merchant, coming here for a temporary Purpose, may be stopped; and, at a Distance from his

1812.

HOWDEN
v.
ROGERS.

his Means and Connections, compelled to find Bail for Debts, contracted in *Ireland*, on the Faith of the Justice, to be there administered, by the same Law as that of this Country. The Effect is equivalent to Imprisonment: *Pearne* v. *Lisle* (a), *Robertson* v. *Wilkie* (b), *De Carriere* v. *De Calonne* (c).

Sir *Samuel Romilly*, and Mr. *Whitmarsh*, for the Plaintiffs.

With respect to the proposed Reference, since the Union a Decree here may be enforced in *Ireland*; but not an Award. This Writ is perfectly regular in the present Instance; and is Matter of Right, if the Party applying for it makes out an equitable Demand; and, that the Defendant is about to quit this Country. The Court has no Discretion to refuse it; and the Circumstance, that the Plaintiffs have had Recourse to another Tribunal, in a Suit, to which the Defendant has not appeared, forms no Objection.

The Cases in *Ambler* have been long over-ruled; if they could have any Application. In *Atkinson* v. *Leonard* (d), and *Roddam* v. *Hetherington* (e), though the Writ was discharged under the peculiar Circumstances, yet Security was required, that the Party would abide the Decree. All the Cases upon this Subject are collected in Mr. *Beames*'s Book (f).

This is a Case of mutual Dealings between two Houses, the one carrying on Business in *Ireland*, the other in *England*

(a) *Amb.* 77.
(b) *Amb.* 177.
(c) 4 *Ves.* 577.
(d) 3 *Bro. C. C.* 218.
(e) 5 *Ves.* 92.

(f) "A brief View of the "Writ *Ne exeat Regno*, with "practical Remarks upon it "as an equitable Process," &c.

1812.

HOWDEN
v.
ROGERS.

land. The natural Jurisdiction is not more in the one Country than the other; and if the Defendants complain of having the Account taken here, the Plaintiffs may with equal Reason press the Inconvenience to them of taking it in *Ireland.* This Writ is usually granted upon the Affidavit of the Party interested; but the Bankrupt, who alone swears positively to this Balance, has no Interest, except that remote Interest in the possible Event of a Surplus.

The Lord CHANCELLOR.

I am extremely well aware, that this great prerogative Writ is issued in Cases, in which it may lead to very extensive, and very harsh, Consequences: on that Account I never indorse the Writ without reading the Affidavit; and in this particular Case I did not indorse the Writ, which was brought to me at the House of Lords, until I had an opportunity of reading the Affidavit very carefully. I saw, that this was the Case of a Person, who had been here some Time; which is not very important; but occasionally here: his general, and almost constant, Residence being in *Ireland.* Considering what had been frequently done in this Court, I had the Satisfaction to find my own Argument in *Atkinson* v. *Leonard* (*a*) very like Sir *Arthur Piggott*'s this Day. In that Case both Parties, having their general Residence at *Antigua,* had come over to this Country on a very particular Occasion. The two Cases in *Ambler* being cited, Lord *Thurlow* says of the first of them, that he cannot rely upon it; as according to his Account of it Lord *Hardwicke* required Security; and, stating the Circumstances of the other Case, said, he should regret, that the Grant of the Writ depended upon such Circumstances; holding himself bound in that Case to grant the Writ. It occurred afterwards to me to establish, that, though generally this Writ

(*a*) 3 *Bro.* C. C. 218.

1812.

HOWDEN v. ROGERS.

was granted only upon an equitable Demand, yet in one Case it issues, where the Demand is both equitable and legal, and in this particular Case, though this Court would have Jurisdiction upon the Account, yet upon the same Affidavit, if the Assignees had taken out a Writ, the Court of Law would have held the Defendant to Bail; though he was here only for a Moment; a Court of Law in an Action by the Assignee of a Bankrupt upon a Balance of Accounts requiring an Affidavit only to his Belief of the Balance; if the Bankrupt, as in this Instance, swears to it positively.

A Court of Law will hold to Bail upon a Balance sworn to positively by a Bankrupt, and to Belief by his Assignees.

Not relying upon that however, I cannot distinguish this Case from *Atkinson* v. *Leonard*, and several subsequent Cases, from the *West Indies*, from *Scotland*, and, I believe, from *Ireland*. The Question therefore is, whether I have any Discretion to refuse the Writ: a Question, upon which I am bound by these Decisions; and the utmost I can do for the Defendant's Relief is to discharge him on giving Security to abide the Decree. Upon that the Practice is so settled, and I have no Option. With regard to the Bill, filed in *Ireland*, that will not within the Reasoning of any of the Authorities be found to be a Circumstance, on which the Court would be justified in withholding the Writ; unless that Act amounted to a Pledge of the Faith of the Party, that he would take no other Remedy elsewhere. That Circumstance should have been stated in the Affidavit; for this Reason; that the Court ought to be very careful in granting this Writ; and should know previously, that all the Circumstances are disclosed; but I do not mean, that, if that Circumstance had been stated, I should not have granted the Writ.

***Ne exeat Regno* granted; the Defendant's general Residence being in the *West Indies*, *Scotland*, and *Ireland*.**

This is a Case of less Hardship perhaps than any other; as the Plaintiffs might have had Bail at Law upon the

 Balance.

1812.
HOWDEN v. ROGERS.

Balance, sworn to; and the Defendant, if he could give Bail, may find Security: the Case of Account forming the single Exception, in which this Writ is applied: though, the Balance being sworn to, the Demand is not purely equitable: but Bail might have been had at Law.

ROLLS.
1812,
Nov. 16, 26.

BRYDGES *v.* WOTTON.

Trustee, dying Nineteen Months after the Testatrix, without having acted, held entitled to a Legacy, given as a Token of Regard and a Recompence for his Trouble: no Refusal or Neglect to act, where necessary, appearing.

THE Master's Report in this Case stated, that the Testatrix by her Will gave to *Nicholas Wescomb* and *John Wescomb Emmerton*, her Trustees, Fifty Guineas each, as a small Recompence for the Trouble they might be put to in the Execution of the Trusts of her Will. The Master disallowed the Legacy to *Emmerton*; as he had by his Answer declined to act in the Trusts of the Will; allowing the Legacy to *Wescomb* on the Ground, that *Wescomb* survived the Testatrix about Nineteen Months; and although he died without having acted in the Execution of the Trusts of the Will, the Master did not find that he was ever informed, that he was a Trustee; or called upon to act; and he had therefore no Opportunity of consenting or declining to act in the Execution of the Will.

An Exception was taken to the Report.

Mr. *Leach*, and Mr. *Treslove*, in support of the Exception.

Where a Legacy is given to a Trustee or Executor expressly as a Recompence for his Trouble, he can only become entitled to the Legacy by undertaking the Trust, in

1812. BRYDGES v. WOTTON.

in respect of which it is given. This, which is clear, as a general Principle, stands also upon Authority: *Humberston* v. *Humberston* (*a*). *Harrison* v. *Rowley* (*b*). In the latter Case a Person, appointed Executor, having interfered as to the Funeral, died; not having taken Probate: it was held, that, though he had not proved the Will, he had adopted the Trusts: the Court intimating that if he had died without shewing any Disposition to take upon him the Trusts, he would not have been entitled to his Legacy. The Conclusion, that though he is prevented from undertaking the Trust even by the Accident of Death, he shall have a Legacy, given to him only in consideration of his executing that Trust, is attended with great Difficulty. Some Inference arises from the common Name of these Trustees; indicating a Family Connection between them: a Circumstance, making it probable that they must have had Notice of a Fact, in which they had that Interest. Claiming under an Exception to the general Rule he must support his Claim by Evidence; Want of Connection with the Family: Residence at a Distance, &c. but if the Title was defeated by Death, or any other Accident, preventing his undertaking the Duty, on account of which the Legacy was given, it is without Remedy.

Mr. *Richards*, and Mr. *Jones*, for the Report.

Besides the Distinction, that there is a determined Mode, in which an Executor takes upon him that Office, a Trustee having no such Means of indicating his Intention to act, he has no Right to interfere, until the Executor assents. The Master does not find, that this Trustee had any Notice. The Debts and Legacies might not be paid, and the Residue formed, for a long Time: until all those Objects of the Trust were fulfilled, his Legacy could not accrue. Until the Residue is formed, and the

(*a*) 1 *P. Will.* 335 (*b*) 4 *Ves.* 212.

1812.
BRYDGES
v.
WOTTON.

Assent of the Executor given, all the Interest remains in him. There is no Period at which it can be represented, that any Trust attached, which this Trustee was not ready to execute. Can he then lose his Legacy on the Ground of Inactivity; having no Motive or Means of Action? The first Trust is for the Executrix for Life; vesting in her the whole legal and equitable Interest; distinguishing it from the Case of *Harrison* v. *Rowley*; where there was no other legal Interest than that of the Executor.

Mr. *Leach*, in Reply, urged, that there was a Trust of the real Estate, commencing immediately on the Death of the Testatrix; subject to the Charges to pay unto or permit and empower *Mary Brydges* to receive and take the Rents and Profits, during her Life; and the Trustee not having acted in that Respect, was not entitled to his Legacy; to which it was answered, that the Bill was confined to the personal Property; and there was no Notice of any thing, relative to real Estate.

After the Argument of the Exception the *Master of the Rolls* observed, that the Will was perfectly stated in the Master's Report. The particular Clause was expressed in the following Terms:

" And I give and bequeath unto the said *Nicholas Wes-*
" *comb* and *John Wescomb Emmerton* my Trustees herein
" after named the Sum of Fifty Guineas a-piece; of which
" I beg their Acceptance, as a Token of my Regard for
" them, and a small Recompence for the Trouble they
" may be put to in the Execution of the Trusts of this
" my Will: the said Legacies of Fifty Guineas a-piece
" given to the said *Nicholas Wescomb* and *John Wescomb*
" *Emmerton* to be over and above the Legacies of Ten
" Guineas

"Guineas hereinbefore bequeathed to them respectively "and to be paid within Twelve Calendar Months after "my Death."

1812.

BRYDGES v. WOTTON.

The MASTER *of the* ROLLS.

Nov. 26.

Upon Inspection of the Will, so far as regards the Legacies to the Trustees, it turns out to be very different from what it is stated to be in the Abridgement of the Master's Report; with which I have been furnished. The Legacies are given, not merely in Compensation of future Services, but also in Token of Regard; and they are to be paid within twelve Months after the Testatrix's Death. Before the End of twelve Months they had no Duty whatever to perform with regard to the personal Estate. They could not meddle with the Residue, until all the Debts and even the Legacies given by the first Part of the Will, were satisfied. At the End of the twelve Months they had a Right to receive their own Legacies. It is not necessary to determine, what would be the Case, supposing they had within the twelve Months refused to accept the Trust; or neglected to act in it in any Matter, in which their Interference might have been necessary; as here is no such Refusal, or Neglect. It is true, there is an immediate Devise to them of the real Estate, subject to the Charges: but not upon any Trust, that required their immediate Interference. The first Trust was to pay unto, or to permit and empower *Mary Brydges* to receive and take, the Rents and Profits during her Life. It is by no means clear, that this was not an Use executed in her (*a*). But in all Events it was no Duty of theirs to turn their *Cestui qui* Trust out of Possession; when she was entitled to all the Rents and Profits during her Life. From their not so doing it is impossible to

Devise in Trust, subject to the Charges, to permit *A.* to receive and take the Rents and Profits for Life: whether not a Use executed, *Quære.*

(*a*) *Vide* 2 *Taun.* 109.

infer

1812.

BRYDGES v. WOTTON.

infer an Abdication of those active Duties, which were imposed upon them in the Event of her Death. I see nothing therefore to prevent these Legacies from becoming payable at the End of twelve Months, according to the express Direction of the Will; and, if payable then, they could not by any thing that happened afterwards cease to be payable; for when a Period of Payment is appointed, the subsequent Failure, or Breach even, of an express Condition, annexed to a Legacy, cannot affect the Right to receive it; as in the Case of *Clench* v. *Brydges* (*a*), and *Osborne* v. *Brown* (*b*).

When a Period of Payment is appointed, the subsequent Failure, or Breach even, of an express Condition, annexed to a Legacy, cannot affect the Right to receive it.

Therefore, the Exception must be over-ruled.

(*a*) *Finch.* (*b*) 5 *Ves.* 527.

LINCOLN'S INN HALL. 1812. *Dec.* 15.

FOULDS *v.* MIDGLEY.

Defendant to a Bill to perpetuate Testimony entitled to his Costs immediately after the Commission executed upon the Allegation, that he did not examine any Witnesses.

THE Bill was filed to perpetuate Testimony. The Defendant joined in the Commission, sued out by the Plaintiff to examine Witnesses; which was executed. The Defendant then obtained an Order for the Taxation and Payment of his Costs; alledging, that he had not examined any Witnesses.

A Motion was made on the Part of the Plaintiff, that this Order might be suspended until Publication passed.

Mr. *Hall*, for the Motion.

This Order was obtained prematurely on a Suggestion, that may not prove true. It is impossible in this State of

1812. FOULDS v. MIDGLEY.

of the Proceedings to know, whether the Defendant has cross-examined the Witnesses, or has examined them in chief. An Idea has gone forth, that if the Defendant examines the Plaintiff's Witnesses, that Examination must necessarily be a Cross-examination: but it depends on the Objects, Effect, and Conduct, of the Examination, whether it be cross, or in chief: a Distinction well known at *Nisi Prius.* At the Time of Lord *Hardwicke* it was not the invariable Practice for the Defendant to have his Costs on Bills *in perpetuam rei Memoriam: Lady Codrington* v. *England* (*a*), *and Berney* v. *Eyre* (*b*). Bound as the Commissioners are to Secrecy, the Examination cannot be known from them: and, if the Witnesses were to divulge it, they would be liable to Reprehension.

Mr. *Parker*, for the Defendant.

As Publication is never passed, where the Object of the Suit is merely to perpetuate Testimony, and as the Defendants have neither produced nor examined any Witnesses, the Defendant, by the Practice of the Court, is entitled to have his Costs immediately taxed and paid him.

The Lord CHANCELLOR.

Distinction between Examination *de bene esse* and perpetuating Testimony.

The Examination of Witnesses *de bene esse* is quite distinct from perpetuating Testimony. It strikes me in this Case, without Prejudice to the Practice, that if one Man in respect of two Estates of his claims a Right of Way over the Estate of another, which claim is admitted as to One Estate, but disputed as to the other, if the Claimant will not do some Act, to enable the other to try that Question, it is a strong Thing to give any Costs

(*a*) *Atk.* 167. 3 *Atk.* 387.

to

1812. FOULDS v. MIDGLEY.

to the Party, admitting, that he threatens only; but will not act. The Practice however, I believe, is so.

If this Bill had stated, not merely a Threat, but an Act, giving a Cause of Action for Trespass, it would not have been a Bill to perpetuate Testimony. The Difficulty I have is, that, if I suspend the Order until Publication, that may suspend it for ever; depending not merely upon the Consent of the Plaintiff and Defendant, but upon the general Rule and Policy of the Court, not to permit the Publication of Evidence, taken in this way, when there may be hereafter an Examination of these Witnesses in chief. Then, how can I know whether there has been what you call Examination in Chief, or Cross-examination; which it may not be easy to distinguish.

The Motion was refused with Costs; the *Lord Chancellor*, in Answer to the Objection, that it may turn out, that the Defendant is not entitled to the Costs, observing, that the Practice was settled.

LINCOLN'S INN HALL. 1812, *Dec.* 23.

TURING, *Ex parte.*

Sentence of the Ecclesiastical Court necessary; though the Marriage void; as in the Case of Lunacy.

IN *January*, 1804, a Commission of Lunacy issued against *John Turing*, under which he was found Lunatic, and a Committee of his Person was appointed; but no farther Proceedings were had under the Commission until within a few Months since; when in consequence of the Death of the Committee, a new Committee both of the Person and Estate was appointed.

On

1812.
Turing, *Ex parte*.

On the 22d of *May* last the Lunatic, being then at large, was by virtue of a Licence procured for that Purpose by his Servant, married to a Mantua-maker, in whose House he then resided.

A doubt having arisen upon the Act of the 15th of *Geo.* 2. c. 30, a Petition was presented by the Committee principally for the Purpose of taking the Opinion of the Court, whether any Steps should be adopted in the Ecclesiastical Court to have the Marriage declared void.

Sir *Samuel Romilly*, and Mr. *Cooke*, in support of the Petition.

Mr. *Bell* for the next of Kin of Lunatic.

Sir *Arthur Piggott*, and Mr. *Wear*, for the Wife, submitted, that under the Act the Mariage is *ipso facto* void and that, therefore, Proceedings in the Ecclesiastical Court were unnecessary.

The Lord Chancellor.

It occurs to me that under the Royal Marriage Act (*a*), declaring certain Marriages void, it has been thought necessary to have a Sentence of the Ecclesiastical Court: but I do not know, on what Ground that Opinion proceeded. Refer it, therefore, to the Master to see, what Proceedings ought to be taken.

(*a*) 12 *Geo.* 3. c. 11.

SCOTT

ROLLS.
1812,
Nov. 23, 24.
Dec. 11.

SCOTT *v.* SMITH.

Account of vicarial Tithes decreed against a *Modus* of 1*s.* *per* Acre for each Acre of Marsh Land for Tithe of Hay and all other vicarial and small Tithes: the Vicarage appearing to have been established by Endowment in 1367, within legal Memory.

THE Bill, filed by the Plaintiff, as Vicar of *Monkton* with the Chapels of *Birchington* and *Wode* annexed, against the Defendants, as Occupiers of certain Marsh Lands, alledged, that the Vicarage was founded in the Year 1367; and was then endowed with divers Kind of Tithes, comprising all Kinds of Tithes within the Parish and Chapelries, except those of Corn and Grain; and prayed an Account of the Tithes of such Marsh Lands.

The Answer, admiting the Endowment in 1367, set up a *Modus*, viz. that "from Time whereof the Memory "of Man is not to the contrary there hath been paid "and payable to the Vicar of the said Parish a certain "ancient *Modus* or customary Payment of One Shilling "*per* Acre for each and every Acre of Marsh Land "within the said Parish for and in lieu of the Tithes of "Hay, and of all and every other vicarial and small "Tithes arising or renewing upon or in respect of each "and every such Acre; and which Sum hath usually "been paid at *Michaelmas* Old Style in each Year."

The Plaintiff produced in Evidence the Endowment of 1367, as deposited at *Lambeth*, commencing thus: "*Universis, &c. ut supra de verbo ad verbum usque vicarium perpetuam in Ecclesiâ supradictâ de Eastriæ loco "cujus scribitur de Monketon præfatis religiosis viris ut "permittitur restituta ordinamus, facimus, et creamus "per presentes portionemque Vicarii et Vicariæ Ecclesiæ "supradictæ de Monketon ordinamus, facimus, et limi-*

"*tamus*

"*tamus subscripto modo consistere debere in perpetuum.*" (viz.)

The Instrument then proceeded to endow the Vicar with the Tithes of Wool, Lamb, &c. Hay, Herbage, or Agistment, &c. and of £12 and 20*d.* declaring the whole to be *per inquisitionem super vallore annuo legitime captam* of the Value of £23, *communibus annis.* The Endowment then proceeds to prescribe the Duties of the Vicar; and concludes thus: *quas restitutionem et reductionem Vicariæ, ordinationem ipsiusque Vicarii, &c. de communi assensu et consensu Capituli nostri pronunciamus, &c.*

The Plaintiff also produced an official Extract from the Parliamentary Survey of Livings, taken in 1649; estimating the Living at £34: 11*s*: 10*d*: *communibus annis,* and likewise a Transcript of the general Ecclesiastical Survey, deposited in the Office of the First Fruits in the *Exchequer,* made in pursuance of the Act of the 26th *Hen.* 8. By another Document produced from the Auditor of the Dean and Chapter of *Canterbury's* Office of the Date of *August,* 1367, entitled a Composition, it is stated, that no Vicarage had hitherto been created or endowed of *Monkton;* and therefore a perpetual Vicarage was thereby created.

Sir *Samuel Romilly,* Mr. *Hollist,* and Mr. *Bernal,* for the Plaintiff.

A Vicar can be entitled to Tithes only by Prescription, or Endowment. The Plaintiff's Title is founded on an Endowment, made in the Year 1367. By reference to that Period, which is considerably within the Time of legal Memory, no such *Modus* could exist; no such Thing being then known as Vicarial Tithe. Another Objection

1812. SCOTT v. SMITH.

Objection to this pretended *Modus* proving, that it must have originated within legal Memory, arises from the Fact, that the Marsh Lands in this Parish are Six Hundred and Eighty Acres; which at One Shilling the Acre would Amount to £34: but in the Reign of *Henry* the 8th, the Value of all the Tithes was £24; and the Parliamentary Survey states them at £34. The Defendants' Witnesses speak of this Payment as an ancient Composition, not a *Modus*. If a Jury were to decide in Favor of the *Modus*, it would be a Verdict against Evidence, and must again be tried; as in *O'Conner* v. *Cooke* (a): but the Parol Evidence does not amount to a *Modus*; and, as laid, it is bad at Law; so that the Court will act consistently with the Decisions in refusing an Issue. The Authority of the Parliamentary Survey has been acknowledged. Previously to 1367, when this Vicarage was created, no Vicarage existed. According to *Coggan* v. *Lord Lonsdale* (b), it ought to be shewn, to whom a *Modus* is paid.

Mr. *Richards*, Mr. *Hart*, and Mr. *Wetherell*, for the Defendants.

It is not necessary to describe the Payment as a *Modus* (c), if it has been customarily paid, and is not rank. It is objected, that, as there was no Vicar, prior to the Year 1367, there could be no Vicarial Tithes: but the Term "Vicarial" has a definite, well-understood, Meaning; and, admitting it to be as standing alone, inaccurate and uncertain, it is here coupled with other Words of Description, rendering its Signification clear and definite. The Expression, used in this Endowment is "*restored.*" It is not therefore to be assumed, that there was no Vicar before that Time. There

(a) 8 *Ves.* 535.

(b) *Gwill.* 1404.

(c) See *Richards* v. *Evans*, *Gwill.* 802.

is

1812. SCOTT v. SMITH.

is no Proof, that the Vicarage did not before exist; the Effect of this Endowment is to restore that, which had previously existed; the Vicarage not being founded by it. The introductory Words of this Endowment perhaps give some Colour to that Assumption; but there are frequently several Endowments; and this was a very late one. The Objection to a *Modus* from the general Amount has always been considered fallacious. However specific this Endowment is, it means, that the Vicar should have the Tithes, or any *Modus* existing in lieu of them. If the Defence is good in Substance, it ought not to fail through a Defect of technical Accuracy. In these Cases indeed, the Court usually gives the Liberty of amending; or sends it to an Issue: much less Nicety being requisite in stating a *Modus* in an Answer than in a Bill. All the Cases shew, that the Court does not tie a Defendant down to such strictness: *Gills* v. *Horrex* (*a*). *Baker* v. *Athill* (*b*), and *Mallock* v. *Browse* (*c*). The Cases are well brought together in Sir *Samuel Toller*'s Book on Tithes (*d*); and all the Authorities shew, that the Court has helped a *Modus* where there has been greater Uncertainty than in this Instance; and has rejected Surplusage (*e*).

Little is to be inferred against the *Modus* from the inaccurate Manner, in which the Defendant's Witnesses speak of it; stating positively the Fact of payment of One Shilling an Acre for Marsh Lands. The Vicar's Books speak invariably of the Composition from 1557. This

(*a*) *Gwill.* 861.

(*b*) *Gwill.* 1243. *Anst.* 491.

(*c* *Gwill.* 905. *Amb.* 423.

(*d*) In addition to the Cases mentioned in the Argument Sir *Samuel Toller* refers to *Atkyns* v. *Lord Willoughby de Broke*, *Gwill.* 1412. *Anst.* 397. *Vyse* v. *Duntze*, *Gwill.* 1124. *Markham* v. *Huxley*, *Gwill.* 1499.

(*e*) *Ellis* v. *Saul*, *Gwill.* 1326. 1335. *Anst.* 332.

1812. SCOTT v. SMITH.

Evidence of Uniformity of Payment amounts to a *Modus-decimandi:* but it is said, that the Parliamentary and Ecclesiastical Surveys are inconsistent with the *Modus*; as according to them the Vicar had more than, or as much as, the estimated Value of the Living. The full Value however might not have been stated in the Surveys; or possibly some of the Lands in the Parish may have since been gained from the Sea; increasing the Tithes.

The Plaintiff has offered no Evidence of Variation in the Payment of this *Modus*; or that Tithes have ever been paid in Kind; and the Surveys are so far from being entitled to implicit Credit, that Commissions have at different Times issued to ascertain; what Tithes have been fraudulently left out of them.

Sir *Samuel Romilly*, in Reply.

This Endowment recites, that no Vicarage had ever hitherto been created; and that it was then first created. The Objection is, not Uncertainty as to the Tithes covered, but that being for vicarial Tithes, it is a *Modus* for Tithes, not then in Existence; which could not have existed in this Parish before 1367. Vicarial and small Tithes are not here synonimous; Hay being expressly mentioned.

Admitting that the same Strictness is not required in stating a *Modus* by Answer as in a Bill, it ought to be the same in Substance. In the Cases, mentioned from *Toller*, it appeared, that, though the Parties had made Mistakes, they had proved in each Instance a good *Modus*. This seems to be a Composition by the Vicar at the Time of the Endowment, long since the Time of legal Memory; and thefore cannot be a *Modus*. No Case is made for an Issue. The parol Evidence proves nothing more than Payment of One Shilling an Acre as an ancient Composition:

1812.
SCOTT
v.
SMITH.

position: not One Witness speaking of it as a *Modus*: nor is that Word to be found in any Part of the written Evidence; not even in the Books of the former Vicars. All the Receipts refer to one Farm; but not one of them speaks of a *Modus*: most of them being for Tithes; a few for Composition. The Supposition, that Lands were recovered from the Sea, is mere Conjecture; and it is extraordinary, if so great a Quantity has been recovered since 1649; when the Parliamentary Survey was made, that it should merely remain in conjecture; no Evidence existing of it. The Surveys are of high Authority, and of great Accuracy.

The MASTER *of the* ROLLS.

Dec. 11.

If this Case had stood merely upon the parol Testimony on the one Side, and the Inference to be drawn from the Ecclesiastical and Parliamentary Surveys, on the other, I should have been disposed to send it to an Issue; instead of taking upon myself in the first Instance to decide upon the Effect of this conflicting Evidence. The Depositions seem sufficiently to shew the Existence of a customary Payment for Marsh Lands, as far as living Memory, or the Tradition of the Parish, can reach; and there is no Trace whatever of the actual Payment of Tithes in Kind for those Lands. The Surveys on the other Hand do go a great way to shew, that at the Period when they were made, the present Rate of *Modus* could hardly have been payable: yet it is possible, that the then Value of the Vicarage might have been under-rated: or that the Quantity of Marsh Land might have been less than it is now; or both. I should therefore hesitate to come to an absolute Conclusion against the Antiquity of the *Modus* from a mere Comparison between the former reported Value of the Vicarage, and the Amount of the Payments at the present Day.

 A more

1812.
SCOTT
v.
SMITH.

A more serious Difficulty however arises from the Production of the Instrument; by which, it is clear, this Vicarage was at first established, as well as endowed. It shews, there was no Vicarage in this Parish before the Year 1367; which is long after the Time of legal Memory. Now the customary Payment of One Shilling for every Acre of Marsh Land is stated to have been immemorially made to the Vicar in lieu of Tithe of Hay (one of the Tithes, with which the Vicarage was endowed) and of all and every other vicarial and small Tithes. The Objection is, that, as before the Year 1367, there was no Vicar, and consequently no vicarial Tithes in this Parish, the Payment stated cannot have been immemorially made. It is not, that upon the Face of the *Modus*, as laid, there is any Defect whatever: but the immemorial Existence of it is disproved.

This therefore has nothing to do with the Cases, in which the *Modus* has been obscurely, or imperfectly, laid; but the Court has from the Answer, or sometimes from the Evidence, been able to collect, what was the Custom, intended to be alledged. Here is no Imperfection or Obscurity in the Answer. If the Allegation were true in point of Fact, it is not contended that the *Modus* would be bad in point of Law: but the Plaintiff shews, that the alledged Payment cannot have existed beyond the Time of Memory. Is it to be said, that, whenever the Evidence disproves the *Modus*, as laid, the Court is to set about framing such a *Modus* as the Evidence would not disprove? It is true, there might be a *Modus*, which the Establishment, or Endowment, of the Vicarage within the Time of Memory would not at all affect; for, if a *Modus* could be presumed as against the Rector, before the Vicarage was created, the subsequent Endowment would not affect the existing Right; and, although it should specify the Tithes, yet it would operate only upon the *Modu*

substituted

substituted in the Place of those Tithes: but, to introduce such a *Modus* into this Case, the Court must wholly recast that, which is laid; and take from it every Part of the specific Description the Defendants themselves have chosen to give to it. That, I think, cannot be done; and therefore the Plaintiff must have a Decree, with Costs.

1812. SCOTT v. SMITH.

LINCOLN'S INN HALL. 1812, *Dec.* 14.

LIVESEY *v.* WILSON.

Liberty by supplemental Answer to correct a Fact, by stating, that Possession was taken under the Contract of part of the Premises only, not of the whole, as stated in the Answer, the Defendant being previously in Possession as Tenant of the other Part, and swearing, that the Mis-Statement was merely from not conceiving it material, refused, without an Affidavit, that he meant by the original Answer to swear to the Fact, as it really was

THE Defendant in his Answer to a Bill for Specific Performance having stated, that he took Possession of the purchased Property, subsequently to the Period, when the Contract was entered into, moved, that he may be at Liberty to file a supplemental Answer; upon Affidavit, stating that he took Possession under the Articles of a Part of the purchased Premises only; being in the actual Possession of the House, other Part of the purchased Premises, at the date of the Contract, as Tenant; and having been so from the 5th of *October*, 1808, about Three Months before the Date of the Contract; that the Inaccuracy arose from his not before stating the Fact to his Solicitor; not conceiving it at all material to be introduced into his Answer; and that it was not omitted by Design or Intention in any Respect; but arose purely through Ignorance.

Mr. *Wingfield*, for the Motion.

The Lord CHANCELLOR.

The Fact, now desired to be introduced, may amount to the most material Fact in the Cause. The whole Case

may

1812.

LIVESEY v. WILSON.

may turn upon it. The Defendant having by his Answer admitted, that he took Possession of the whole Property under the Contract, why am I to permit him to state, that he took Possession of Part of the Property only? It is not the Mistake of a Fact; and the Consent of the other Party is immaterial. I am unwilling to make such a Precedent; and consider this Motion as of such Importance, that I will not grant it; unless the Defendant will tell me on his Oath, that, when he swore to his original Answer, he meant to swear in the Sense, which he now desires to be at Liberty to swear to: if he did not, I will not suffer him to avail himself of the Fact, as he now represents it (*a*).

WHITE

Instances of permitting and refusing Amendment by Supplemental Answer.

(*a*) With respect to Answers the Court has indulged Defendants by permitting them to amend in Cases of Mistake: 1st, in small and immaterial Matters, *Berney* v. *Chambers, Bunb.* 248. *Sed vide Montague* v. ———, *Gwill.* 674, Note; and *Willis* v. *Fowler, Gwill.* 1242: 2dly, where a Mistake had crept into the Ingrossment, *Gainsborough* v. *Gifford*, 2 *P. Wms.* 426: 3dly, where new Matter has been discovered since the original Answer put in, *Patterson* v. *Slaughter, Amb.* 292. *Wells* v. *Wood*, 10 *Ves.* 401: 4th, in case of Surprise, *Chute* v. *Dacre*, 1 Eq. Ca. Ab. 29. *Foster* v. *Foster*, 2 *Bro. C. C.* 619. *Pearce* v. *Grove*, 3 *Atk.* 522. *Amb.* 65. S. C.: 5thly, in Mistakes of Names, *Griffiths* v. *Wood*, 11 *Ves.* 63. But where the Defendant mistook, 1st, the Law, *Pearce* v. *Grove*, 3 *Atk.* 522. *Amb.* 65. S. C.: 2dly, where the Defendant had unintentionally perjured himself, and an Indictment was suspended over him; and 3dly, where from the Circumstance, that at the Time of the Answer put in the Defendant had not set forth his Defence from an Inability to state it with Precision, 2 *Anst.* 363, the Court has refused him the Indulgence of amending. As to the *Mode* of amending, the Practice formerly was, to allow the Answer to be taken off the File, and a new Answer to be put on it. But the present Practice is understood

LINCOLN'S INN HALL. 1812, *Dec.* 21.

WHITE *v.* FUSSELL.

Commission to examine to Credit should be executed before Decree. Costs given on that Ground.

ON the 6th of *July*, 1812, an Order was obtained by the Defendants for a Commission to examine Witnesses as to the Credit of a Witness, examined in the Cause on the Part of the Plaintiff, and as to such particular Facts as were not material to what was in Issue; the Consideration of the Costs being reserved until after the Hearing; which this Order was not to delay (*a*). On the 15th of the same Month the Cause came on to be heard at the *Rolls*; when, the Defendants not admitting the Plaintiff's Title, as First Cousin of a certain Person, the Merits were not gone into: but a Reference was directed to the Master to ascertain the Cousins living, with the usual Directions.

The Defendants having examined as to the Credit of the Plaintiff's Witness subsequent to that Hearing, the Plaintiff moved, that the Defendants might pay him the Costs of the Application, reserved by the Order of the 6th *July*, the Costs incurred by him in the Execution of the Commission; and the Costs of the present Application.

Mr. *Hall*, in support of the Motion.

stood to be to permit a supplemental Answer to be filed, leaving the Parties the Effect of what was originally sworn, with the Explanation of the subsequent Answer. *Jennings* v. *Merton College*, 8 *Ves*. 79. *Dolder* v. *Bank of England*, 10 *Ves*. 284. *Wells* v. *Wood*, 10 *Ves*. 401.

(*a*) See *Purcell* v. *M'Namara*, 8 *Ves*, 324.

1812.
WHITE
v.
FUSSELL.

The Plaintiff is entitled to these Costs on Two Grounds; first, the Commission has totally miscarried in its Attempt to affect the Character of the Plaintiff's Witness: secondly, it has been improperly executed. The Costs having been reserved until the Hearing of the Cause, the Commission ought to have been executed before the Hearing; and by the Delay in executing it the Plaintiff is precluded from obtaining his Costs, unless by a summary Application. The Execution of the Commission after the Hearing could have no other Object but that of injuring the Character of the Witness: and was therefore highly improper; and an Abuse of the Order. Another Objection is, that this Examination went to points in Issue, and already examined to in chief; although it was expressly confined to such particular Facts as were not material to what was in Issue. No Example can be produced of examining to Credit after a Decree; and *Russell* v. *Atkinson* (a) shews that the Commission ought to be executed in Time to have the Benefit of it at the Hearing.

Mr. *Owen*, for the Defendants.

An Examination to Credit can only take place after Publication; and the Question is, whether this Cause has been so disposed of, as to prevent the Defendants from using the Depositions, taken under this Commission. The principal Point of the Cause has not been heard: and the Question, whether the Evidence, now objected to, is not to be used, remains for Consideration, when the Cause shall come on again. This Application therefore is premature.

The Lord CHANCELLOR.

I am clearly of Opinion, that the Plaintiff is entitled to the Costs of the Commission upon this Ground. The

(a) 2 *Dick.* 532.

Application

1812.

WHITE v. FUSSELL.

Application for Examination to Credit, regarded with great Jealousy: confined to Facts, affecting Credit, and Character only; and not material to what is in Issue.

On Appeals and Re-hearings additional Evidence permitted in some Instances. If the Rule is so, it must be subject to Costs.

Application is of a Kind, always regarded with great Jealousy: for an Examination to the Credit of a Witness, who has been examined in the Cause. The Court, to sustain its general Rules, requires, that the Examination should be only to the Credit of the Witness; and to Facts, affecting Credit and Character only; and those not material to the Matters in Issue in the Cause. All the Guards of the Court upon an Examination for this Purpose would be ineffectual by permitting it to take place after a Decree. It is obvious, that the Use of examining to Credit is, that the Court may weigh the Testimony of that Witness, to affect whose Credit is the Object of that Examination. The Court ought therefore to take Care, that the Examination to Credit should be had before the Hearing of the Cause: and I am satisfied, that was the Intention of the Court in this Instance. Upon Appeals and Re-hearings it has often been contended, that the Parties may go into fresh Evidence; and that has been in some Instances permitted (*a*): but, if it comes to a Question of Costs, and the Rule should be laid down, that you may add to Testimony upon an Appeal, still the Party, if he succeeds ought to indemnify the other for not having that Evidence at the Time it ought to have been read. Upon general Principles, I must take the *Master of the Rolls* to have attended to the Deposition of every Witness examined; and that he may have attached to the Evidence of this Man a Weight and Authority, which it might not have admitted, if this Examination to Credit had taken Place at an earlier Period.

Upon the mere Ground therefore, that this Commission was executed after the Hearing, the Costs must be paid by the Defendant.

(*a*) See 10 *Ves.* 237, 8, *Dashwood* v. *Lord Bulkeley.*

CARLEN

LINCOLN'S INN HALL.
1812.
Dec. 23, 24.

CARLEN *v.* DRURY.

Under a Bill by some Partners in a joint Concern on behalf of themselves, and the others, Three Hundred in Number, for a Dissolution, Receiver, &c. and an Account alledgiug Mismanagement by the Managers, the Court refused to interfere by Injunction and the appointment of a Receiver, in the first Instance, until they had tried the Means of Redress, provided by the Articles.

As to the Legality of a Partnership of Sixteen Hundred Shares (See Stat. 6 *Geo.* 1. c. 18. s. 18) and, if legal, the Capacity of some to sue for a Dissolution on behalf of the rest, and as to the Necessity of an Offer of Contributions to Losses, &c. *Quære*.

BY Indenture, dated the 21st of *June*, 1808, the Plaintiffs, the Defendants, and divers other Persons, agreed to become Partners in a Concern called *The Bankside Brewery*, for a Term of Ninety-nine Years, subject to certain Regulations; amongst which were the following:— that the Affairs of the Concern should be conducted by *Drury* and Two other of the Defendants by Name, as Managers, at a certain Salary: each Partner to possess a several and distinct Right to his Share; so that it should go to his Representatives, and not accrue to the Survivors; that the Managers may at any General Meeting be removed and other Persons elected, such Removal being approved at a second General Meeting; that General Meetings for the Adjustment of the Affairs of the Partnership shall be held at *Lady-day* and *Michaelmas*, or within a Month after at such Place as the Managers shall appoint; that a Committee of Twelve of the Partners shall be annually appointed for auditing the Accounts, and to advise the Managers for the better carrying on the Trade; and in case the Managers should misbehave themselves, this Committee, or any Seven of them, were authorised to call a special General Meeting of the Copartners, to make a Report thereon; the Committe were to meet every Six Weeks; and in case of Emergency oftener, if Two-thirds of it saw fit; the Managers were invested with full Authority to regulate the general Affairs of the Concern, as Factors; in case the Affairs of the Concern became embarrassed in the Opinion of the Committee, or any Seven of them, a General

a General Meeting was to be convened, to consider whether the Capital should be increased, or the Partnership dissolved; but no Dissolution was to take place, until twice deliberately put, and carried by a Majority of Three-fourths of the Partners, at a General Meeting; and unless confirmed by a similar Majority at a subsequent General Meeting, specially to be convened. This Deed was subscribed by between Two and Three Hundred Persons.

A Bill was filed by the Plaintiffs, who were Six of the Committee, on behalf of themselves, and all other the Partners, against the Defendants, Three of whom were the Managers, and Six of whom were Committee-men; alledging Circumstances of gross Mismanagement, and Neglect on the Part of the Managers; and praying an Account, a Dissolution of the Partnership; that a Receiver might be appointed, and in the mean Time that the Defendants might be injoined from receiving the Rents, from contracting Debts, and collecting the Effects of the Concern, &c.

A Motion was made for an Injunction and Receiver.

Sir *Samuel Romilly*, and Mr. *Bell*, for the Motion.

Mr. *Hart*, and Mr. *Wear;* Mr. *Leach*, and Mr. *Shadwell;* and Sir *Arthur Piggott*, for the several Defendants.

No substantial Ground has been laid for the extraordinary Interference of this Court. The Plaintiffs, who are only Six out of Three Hundred Persons, might if really aggrieved, have resorted to the Means of Redress, given them by the Articles. They have no Right to come here, until they have failed in obtaining Justice by pursuing the Course, suggested by the Articles. Besides, the Partnership

1812. CARLEN v. DRURY.

ship itself is illegal within the very Terms of the Act (*a*); *The King* v. *Dodd* (*b*). *The King* v. *Webb* (*c*).

If Persons conspire to raise transferable Shares it is a Nuisance within the Words of the Statute; and the Undertaking, by which it is to be effectuated is itself void. The Act, which is founded upon the soundest Rules of Policy, will, if this Partnership stands, be directly evaded.

Sir *Samuel Romilly*, in Reply.

There is no Ground to contend, that this Case comes within the Act. The Decision of *The King* v. *Webb* proceeded on the Ground, that the Shares were not transferable, but on certain Conditions. In Principle the present Case is the same as that; which bears no Resemblance to *The King* v. *Dodd*: a Case, decided on another Ground. The Objection, taken to the Interference of the Court, that there are other Means of Redress pointed out, by calling a General Meeting, cannot prevail against the pressing Occasion for such Interference: the Concern being threatened with immediate Ruin, if that Interference shall be delayed. Nothing can more strongly prove this than the Fact, that, though the original Capital was upwards of £100,000, the present Funds scarcely amount to £11,000, not more than Two Shillings in the Pound.

The Lord CHANCELLOR.

I do not enter into the Question, whether this Partnership falls within the Terms of the Act; which, according to the View I take of the present Motion, it is unneces-

(*a*) 6 *Geo.* 1. c. 18. s. 18.
(*b*) 9 *East.* 516.
(*c*) 14 *East.* 406.

sary

sary to consider. I also lay out of my View the small Interest, which the Plaintiff possess in this Concern; though bound to recollect the Amount of their Share, compared to the whole Value. Whether this Concern, which commenced in 1808, be, or not, a Nuisance within the Terms of the Act, it is certainly of great Importance to the Parties interested to be aware of their Rights and Responsibilities.

I hold it to be clear in the first Place, that, according to the Rule of Law the Person, who takes upon himself the Management, is answerable to the whole Extent of his Engagements; secondly, that each Individual is at Law answerable for the Amount of the whole of the Debts of the Concern; and thirdly, that each Individual is liable to a Contribution for what the Agents have paid: but, where the Nature of the Institution necessarily requires a great Number of Persons to be concerned, it is impossible for the strong Arm of the Law, however powerful, to grasp them all. In the present Instance, there is not only nothing to prevent, but the very Terms of the Articles provide, that One Thousand Six Hundred Persons may eventually be interested in the Concern. I agree with what has been urged for the Plaintiffs, that, if the Means of Redress, provided by the Parties themselves in the Articles, are not effectual, this Court will interfere. These Parties have however put themselves under the Controul of a Committee as to many Things of considerable Importance to their Interest. They seem to have been aware of the Inconvenience, arising from the Number of Proprietors; and as it was material for them to guard against Disputes, so likely to be generated under this Order of things, Managers are provided; and that this might not be insufficient, Two annual Meetings are to be held.

1812.
CARLEN
v.
DRURY.

It is true, those Meetings are to be at the Discretion of the Managers: but I have no Difficulty in saying, that this Court would compel the Managers to appoint Meetings; this being but *casus omsusis* in the Articles. They likewise provide for removing the Managers; and, not trusting entirely to their Providence, make a Provision for a standing Committee of Twelve Persons. If the Conduct of the Managers came under the Discussion of the Committee, there must, as I construe the Articles, be a subsequent Meeting; to determine whether the Managers should be dismissed, or not: but the Articles provide, that a Dissolution shall only take place in One Instance. Here, however, I observe, that there is a Principle of a Court of Equity paramount these Agreements, in respect of which this Court will interfere; but not in the first Instance. In order to obtain that Interference a Case of Breach of Engagement, or Abuse of Trust, must be established to the Perfect Satisfaction of the Court; that Persons will not according to their Duty attend to the Interests of the Concern. The Managers of this Concern are entrusted to a great Extent to increase the Capital at their Discretion; which I take to be a very material Circumstance. This Court is not to be required on every Occasion to take the Management of every Playhouse and Brewhouse in the Kingdom: but, if the Case justifies the Interference of the Court it may appoint a Manager in the Interim, for the Purpose of winding up, and putting an End to, the Concern. The Court however is not at once to assume, that the Committee will not act. Here are Twelve Trustees. Is it then founded in Contract, that Six can come here? That is a Case actually shut out. They come here then, on the Ground, not that the Contract furnishes no Redress, but that there is bad Management.

Suppose, that after the Appointment of a Receiver the second Meeting should take place; and it should be decided

decided at that Meeting, that the Concern should go on as usual, or in some other Manner differently from the Course I had ordered: what would be the Result? If, however, a Case of Delinquency should be clearly made out, I do not hesitate to declare, the Court would act: but there must be a positive Necessity for the Interference of the Court, arising from the Refusal or Neglect of the Committee to act. That may raise a Case for prompt and immediate Interference: which I cannot say exists at present. I express no Opinion upon the Questions, whether this is a legal Partnership; and taking it to be so, whether the Plaintiffs can file a Bill for a Dissolution on behalf of near Three Hundred other Persons; observing merely the Difficulty, that must arise, if those other Persons wish the Partnership to be carried on; and, if the Society be answerable to the Managers, and bound to a Contribution to Losses, &c. whether any one can institute a Suit here without offering to contribute: but, confining myself to the Object of the present Motion, I think I cannot now interfere: the Plaintiffs having a Remedy in their own Hands, to which they have not resorted: desiring to be understood, not to repudiate the Jurisdiction; but that I will not interfere, before the Parties have tried that Jurisdiction, which the Articles have themselves provided (*a*).

The Motion was refused with Costs.

(*a*) See *Waters* v. *Taylor*, 15 *Ves*. 10.

RAWSON,

1813.
Jan. 26, 27.

RAWSON, *Ex parte.*
MASON, *Ex parte.*

Four Partners: Two carrying on together a distinct Trade: first a joint Commission against those Two: then a joint Commission against the Four; and afterwards separate Commissions against the Two, who were not Objects of the first Commission.

The Commission against the Four supported; confirming Purchases under the first Commission against the Two; the only Commission strictly legal and providing by Arrangement for future Operations under it.

HENRY Sherrington, George Cooper, Leonard Cooper, and *John Young,* carried on Trade together, as Co-partners; and *Sherrington* and *George Cooper* were engaged together in a distinct Business. On the 21st of *February,* 1811, a Commission of Bankruptcy issued against *Sherrington* and *George Cooper;* under which they were declared Bankrupts. On the 14th of *March,* 1811, a Commission issued against the Four; under which they were all declared Bankrupts. On the 29th of the same Month, a separate Commission issued against *Leonard Cooper:* but he was not declared a Bankrupt under it; and on the 24th of *April,* 1811, a separate Commission issued against *Young:* but he was not declared a Bankrupt under it. Various Proceedings had taken place under the Commission of *February;* such as Sales, Receipts of Money, Actions, &c. and Orders had been made on Petition under the several Commissions.

A Petition was presented by the Assignees under the joint Commission against the Two, and the Assignees under the joint Commission against the Four: praying, that the Two separate Commissions against *Leonard Cooper* and *John Young* might be superseded at the Costs of the respective petitioning Creditors and Solicitors; and that, if the first Commission against *Sherrington* and *George Cooper* should be superseded, an Arrangement might be made to prevent the Impeachment of any of the Proceedings under it.

Sir *Samuel Romilly,* and Mr. *Heald,* for the Assignees under the joint Commission, against the Two; and Mr. *Hart,*

Hart, and Mr. *Wear*, for the Assignees under the joint Commission against the Four.

1813.
RAWSON, *Ex parte*.
MASON, *Ex parte*.

The Objection to the Commission against the Four from the previous Commission against the Two still existing, without Certificates, is a mere Objection of Form against the real Justice of the Case; requiring a Commission against the Four. If it should, however, be thought necessary or convenient, both these Commissions may be supported; as was done in the Time of Lord *Hardwicke*. A more recent Instance of concurrent Commissions is that of the *Gosport Bank* (*a*); and both may be maintained, at least for the Purpose of proving Debts. The constant Course is to supersede a Commission against some of the Partners; in order to open the Way for a joint Commission against all; taking Care to do Justice to those, who sued out the first Commission (*b*).

Mr. *Cullen*, and Mr. *Bell*, for the Assignees under the Two separate Commissions.

These Petitioners have no common Interest. The Commissions against the Two and the Four cannot subsist together: the first being valid, the other must fall; and the Consequence is, that the separate Commissions are free from Objection. If, however, Convenience is to govern, the Property will from the peculiar Circumstances of this Case be most conveniently administered under the joint Commission against the Two, and the Two separate Commissions: but though upon the Ground of Convenience the subsequent Commission against the Four should be supported, the Assignees being ordered to confirm

(*a*) *Ex parte Scott*, *Rose's* Bankruptcy Ca. 12. See also *Ex parte Perry*, *ibid.* 12. *Ex parte Upham*, 17 *Ves.* 212.

(*b*) *Ex parte Brown*, *Ante*, 60.

1813. RAWSON, *Ex parte.* MASON, *Ex parte.*

Sales under the former Commission, how are Judgments obtained, how is the Case of Commitment, to be provided for? As to the Cases alluded to in the Time of Lord *Hardwicke*, Experience has proved the Inconvenience of that Rule; which has not been sanctioned by recent Practice. The Case of the *Gosport Bank* was merely a temporary Commission for a given and limited Purpose. The Effect of superseding the separate Commissions will be most mischievous; depriving the separate Creditors, and the Bankrupts, of the Benefit of the Bankrupt Laws, and the latter especially of their Certificates.

Sir *Samuel Romilly*, in Reply.

There is no Ground for imputing Collusion to the Assignees under the joint Commissions: no Advantage in suffering the separate Commissions to stand: and no Inconvenience in superseding them. The Solicitors, who took them out, assumed, that your Lordship would act contrary to all Practice by superseding the Commission against the Four. The Argument amounts to this: that, if a separate Commission were taken out against *A.* and then a joint Commission against *A.* and *B.* a separate Commission may issue against *B.* the joint Commission against *A.* and *B.* being void, as there was a Commission previously existing against *A.*: but the Rule is, that where there is a legal separate Commission, and afterwards a joint Commission issues, which strictly is illegal, the legal Commission will be superseded; as it is for the Interest of all the Creditors, and prevents Expence, to have the Property administered under the joint Commission; which was in the first Instance informal and illegal. If no Sales or other Acts had taken place under the joint Commission against the Two, this Petition would have been of course; and as the Effect of all,

that

1813. RAWSON, Ex parte. MASON, Ex parte.

that has been done; may be secured by Arrangement, those Acts form no Impediment to the usual Course. The Destruction of the Certificate is not a Consequence from superseding the Commission: which the Statute (*a*) declares a Bar, except in the specified Cases of Fraud, Gaming, &c. (*b*).

The Lord CHANCELLOR.

Jan. 27.

An Order, which was made in *August*, has placed these Parties in Circumstances, that make it no longer unfit for the Assignees of the Two and the Four to join in this Application. A Difficulty arises in this Case from the clear, established Law, that strictly the Commission, first taken out and prosecuted, is the legal Commission: and the Practice, which, after frequently changing has been long settled; that, where different Commissions are taken out, all being invalid except One, the *Lord Chancellor* is in the constant Habit of holding, that, if Justice, the most ample Justice, can be done to the Creditors and Purchasers under the first Commission, that Commission shall be supported, under which the most ample Justice can be done to all; cutting down all the rest.

Settled Rule, in case of different Commissions of Bankruptcy to support that, which wil do the most ample Justice; superseding all the rest.

Lord *Hardwicke* certainly did, it is difficult to say how, sustain joint and separate Commissions, all at the same Time; and it was impossible that he could have made the Orders he did make, unless he was prepared to go farther; to the Extent of giving Protection by Orders, in the Nature of an Injunction.

The former Practice to support joint and separate Commissions at the same Time: now the joint Commission alone supported; with distinct Accounts.

In the Period, while I attended that Bar, a different Course prevailed. Where there was a Partnership of

(*a*) Stat. 5 *Geo.* 2 c. 30.

(*b*) See *Ex parte Tobin*, *Post.*

Five

1813.
Rawson, *Ex parte.*
Mason, *Ex parte.*

Five Persons, for Instance, and distinct Partnerships of Four, Three, and Two, of them, if Commissions were taken out against each Partnership; and separate Commissions against each Individual, all those Commissions, except the joint Commission against the whole Number, were superseded; and distinct Accounts were directed of the different joint and each individual Estates. The Effect was, that the Affairs of Bankrupts of that Description were administered at much less Expence, and with much less of Complication and Difficulty, than by supporting all the Commissions; or, as is insisted upon here, supporting the joint Commission against the Two, and the separate Commissions against the Two others; where the Effects of the Four are to be collected; requiring the Co-operation of all the Assignees under the different Commissions; which in many Cases cannot be had without great Difficulty; and in some would be impossible.

Considering this therefore as the Case of a joint Commission against Four Persons, liable to no Objection but the Existence of a previous Commission against Two of them, and nothing having been done under that Commission, I should have only to follow the Example of my Predecessors: but, supporting the subsequent Commission, and superseding the first, I must take Care that Purchasers under that Commission are safe. Under the separate Commissions nothing has been done. The Purchases must be confirmed; and the Expences defrayed out of the Assets. As to the Actions, in most Instances the Fruit of them has been obtained; and an Arrangement may be made for carrying on the future Operations under the Commission against the Four. I will so express the Order as to the Commission against the Two, which I do not mean at this Moment to supersede, as will preclude Embarrassment from the Facts.

RAMSBOTTOM

Rolls.
1812.
June 29.
Dec. 18.

RAMSBOTTOM *v.* GOSDEN.

Construction of a Contract; that a Reference of the Expences was confined to the Expence of the Conveyance: but the Evidence of the Attorney was admitted for the Defendant to prove the Intention of both Parties, according to verbal Instructions, that the Plaintiff, the Purchaser, should also pay the Expence of making out the Defendant's Title.

THE Bill in this Cause prayed the specific Performance of a Contract for the Sale of an Estate by the Defendant to the Plaintiff: the Question raised turning upon the following Terms of the Contract:—

"And it is hereby farther agreed that he the said "*George Gosden* will forthwith make and deliver unto the "said *James Ramsbottom* or his Solicitor an Abstract of "the Title of him the said *George Gosden* to the said "Land: and will also deduce a clear Title thereto and "also that the said *George Gosden* or his Heirs and all "other necessary Parties shall and will on or before the "10th of *May* next at the Costs and Charges of either "or both of the said Parties hereto in such Proportions "as shall be determined by *Robert Tebbott* to whom "the Decision of the same is hereby referred exe- "cute proper Deeds of Conveyance for conveying and "assuring the Fee-simple and Inheritance of the Pre- "mises unto the said *James Ramsbottom* his Heirs or "Assigns free from all Incumbrances," save a certain Mortgage.

The Defendant by his Answer stated, that originally he had no wish to sell; that on being applied to by Plaintiff he had so expressed himself; observing, that, if he did sell, he would have a certain Price *per* Acre: and that he would not be at any Expence whatever; but must have the clear and full Amount of the Purchase-money; that the Plaintiff attempted to induce him to bear the Expences of making out his Title; but he refused; that the Plaintiff afterwards called on the Defendant's Solicitor, and distinctly agreed to leave the Question of "the

1812.
RAMSBOTTOM.
v.
GORDEN.

"said Expences" to the Decision of *Tebbott*; and gave Directions to have it so inserted in the Contract. The Defendant submitted to make a good Title at the Expence of the Plaintiff; alleging, that at the Time the Contract was executed not only he and his Solicitor, but the Plaintiff understood, that the latter was to bear the Expences as well of making out the Title as of the Conveyances of the Estate: the Defendant relying also upon the general Custom for the Purchaser to pay the Expence of the Conveyances.

The Defendant's Solicitor, who drew the Agreement, and *Tebbott*, were examined to prove, that the Plaintiff agreed to pay the Expence of making out the Defendant's Title; in deducing which some outstanding Terms were to be got in; and that the Omission of the Contract to express that Intention of the Parties proceeded from the Mistake of the Solicitor.

Sir *Samuel Romilly*, and Mr. *Utterson*, for the Plaintiff, resisted the Introduction of parol Evidence to vary, or correct, the written Agreement upon the mere verbal Instructions of the Solicitor; though in some Cases Instruments have been reformed upon written Instructions. They cited, and distinguished, *The Marquis of Townsend* v. *Stangroom* (a), *Lord Irnham* v. *Child* (b), *Lord Portmore* v. *Morris* (c), *Filmer* v. *Gott* (d), *Rich* v. *Jackson* (e), *Parteriche* v. *Powlet* (f), *Lord Milton* v. *Edgworth* (g), *Hare* v. *Shearwood* (h), *Foot* v. *Selway* (i), *Joynes* v. *Statham* (k), and *Clark* v. *Grant* (l).

(a) 6 *Ves.* 328.
(b) 1 *Bro. C.C.* 92.
(c) 2 *Bro. C.C.* 219.
(d) 7 *Bro. P.C.* 70.
(e) 4 *Bro. C.C.* 514. 6 *Ves.* 334, Note (c).
(f) 2 *Atk.* 383.
(g) 6 *Bro. P. C.* 587.
(h) 3 *Bro. C.C.* 168.
(i) 2 Ch. Ca. 142.
(k) 3 *Atk.* 388.
(l) 14 *Ves.* 519.

Mr

Mr. *Leach*, and Mr. *Wilson*, for the Defendant.

1812.
RAMSBOTTOM
v.
GOSDEN.

This Agreement varies from the Intention of the Parties at the Time of signing it; and why is not that, when produced by Accident or Mistake, as good a Defence, as when created by Fraud; as in *Woollam* v. *Hearn* (a). ? Accident or Mistake can seldom be proved by written Evidence.

Sir *Samuel Romilly*, in Reply.

The Admission of such Evidence would be most dangerous. The Security of a written Agreement would be vain; if it remained thus at the Mercy of the Person, who drew it; if it depended upon him afterwards to say, what shall be the Terms. Here is no Omission from Hurry or Accident. The Evidence does not amount to this; that any Thing is omitted, which he was instructed to insert. He drew the Agreement according to the Intention of the Parties, as he understood it at that Time: but his Construction is erroneous. It is probable, that in the Course of the Treaty this Objection, so contrary to Practice, was given up by the Defendant; but to what can the Court look but the Agreement itself; unless Fraud is proved; or some Omission from Inattention, &c.?

The MASTER *of the* ROLLS.

There is no Question in this Case as to the Substance of the Agreement: the Dispute relates only to the Expence of making out the Title. The Defendant says, that, having originally objected to be at that, or any other, Expence, attending the Sale, it was ultimately agreed, that *Tebbott* should determine, by whom, and in what *Dec.* 18.

(a) 7 *Ves.* 211. See also *Higgenson* v. *Clowes*, 15 *Ves.* 516.

1812. RAMSBOTTOM v. GOSDEN.

Proportions, all the Expence should be borne. It is contended by the Defendant, that this is provided for by the written Agreement; or, if not, that the Provision has been omitted by Mistake; which he offers to prove by the Evidence of the Person, who drew the Agreement. As to the Construction of the Agreement, if the Defendant is right, there is an End of the Case: if not, the Question is, whether Evidence of the Mistake can be admitted.

In my Opinion this Agreement refers nothing to *Tebbott* except the Expence of the Conveyances. The Provision as to the Title is distinct and separate. The Plaintiff himself is to make out his own Title: it is not indeed said, at his own Expence: but that follows, if there is no different Stipulation; which I think in this Case there is not.

An Omission in an Agreement by Mistake stands on the same Ground as an Omission by Fraud.

As to the Mistake, I conceive parol Evidence of it may be received. In *Joynes* v. *Statham* (a) Lord *Hardwicke* held, that an Omission in an Agreement by Mistake stood upon the same Ground as an Omission occasioned by Fraud. In that Case nothing was said in the written Agreement as to Payment of Taxes; as nothing is said in this Agreement as to the Expence of making out the Title: but the verbal Agreement was, that the Tenant should pay the Taxes; and here it is said, a verbal Instruction was given by the Plaintiff himself so to frame the Agreement, that the whole Question as to the Expence, both of the Title and Conveyance, should be submitted to *Tebbott*; and it is alleged, that the Attorney, who prepared it, conceived, that the Words he had used would be sufficient for that Purpose. The Court thinks them not sufficient. The Omission therefore arises from the

(a) 3 *Atk.* 388. See *Rich* v. *Jackson*, 4 *Bro. C. C.* 514. 6 *Ves.* 334, Note (c).

Mistake

1812. RAMSBOTTOM v. GOSDEN.

Mistake of the Attorney, contrary to his Intention of the Parties; and that I think may be shewn by parol Evidence.

It seems to me, that the Circumstances of the Transaction correspond with this Representation of the Attorney; as, if this Controversy ever existed between these Parties, it is most improbable, that it could have ended in the Manner supposed by the Plaintiff. The Defendant had objected to be at the Expence even of making out his own Title. He was not called upon to bear any other Expence; yet the Dispute is supposed to end in his taking upon himself absolutely the Expence of making out his Title, and then submitting it, as a Question for the Determination of *Tebbott*, whether he should not also bear the whole, or some Part, of the Expence of the Conveyance: of which he had not before been called upon to bear any Part. It is most improbable, that the Plaintiff should have proposed such a Mode of terminating the existing Difference; or that the Defendant should have acquiesced in it.

The Plaintiff must therefore submit to have the Agreement performed in the Way, contended for by the Defendant: or the Bill must be dismissed.

BURDEN

Lincoln's Inn Hall. 1813, *Jan.* 12.

BURDEN *v.* BURDEN.

Surviving Partner, being Executor, not entitled without express Stipulation to any Allowance for carrying on the Trade after the Testator's Death.

Allowed Expences actually incurred under an erroneous Conception, that he was sole Proprietor by Purchase from his Co-executors; set aside as a Breach of Trust; though *bonâ fide.*

THIS Cause coming on for farther Directions, a Question was raised, whether the Defendant, who was one of the Executors, and also was surviving Partner of the Testator, should have an Allowance for his Management of the Copartnership Trade subsequently to the Death of the Testator.

Sir *Samuel Romilly*, and Mr. *Bell*, for the Plaintiffs.

The Defendant is not entitled to any Allowance; since, independently of other Circumstances, the Profits made barely exceed the common Interest. The Executor, therefore has not carried on the Trade to the Benefit of the *Cestuis que* Trust. A Trustee is bound to execute his Trust without Compensation. An Executor, indeed, if it be necessary to continue a Trade, may employ a Person to conduct it; and his Payments to such Person would be allowed: but, if the Executor carries on the Business himself, he cannot claim any Allowance. It is impossible to distinguish that from the other Duties, inseparable from his Character; such as collecting Debts, &c.; for which he is clearly not entitled to any Compensation.

This Defendant stood in the double Capacity of surviving Partner and Executor; and there is no Instance, that a surviving Partner, carrying on a Trade without the Consent of the other Parties interested, was held entitled to an Allowance for Management. The Principle would be most pernicious, as applied to Executors. If in this Instance the *Cestuis que* Trusts have derived some Benefit, it is very small; and by no Means commensurate to the Risk of their Capitals; and an Allowance for Management

nagement, if it ought to be made, must refer, not to the Trouble of the Person employed, but to the Benefit, derived to the *Cestuis que* Trust from his Exertions.

1813.
BURDEN v. BURDEN.

Mr. *Leach*, and Mr. *Horne*, for the Defendant.

The Executors sold to the surviving Partner: and the Master reports, that the Sum given was the full Value of the Property; which proves, that the Transaction was *bonâ fide*. The *Cestuis que* Trust, receiving the full Value of their Property, incurred no Hazard; and have no Right to complain; as substantial Justice has been done them. In conducting the Trade the Defendant has not only been exposed to much personal Labour, but has incurred considerable Expences in Journies, &c.; of which, relying on the Faith of his Purchase from his Co-executors, and considering himself as thereby sole Owner of the Business, he has kept no Account. Substantial Justice therefore can only be done to him by an Allowance for Management. Many Cases, in which *Cestuis que Trust* have been allowed Profits, or Interest, at their Election, are Cases of mere Executors; who having an Option to carry on the Trade, or not, could not complain: but this Executor, being also the surviving Partner, had in his own Right a distinct Interest, which compelled him to interfere with the Trade: and gave him the Right to do so. He has carried it on fairly; and Misconduct is not imputed to him.

Sir *Samuel Romilly*, in Reply.

However material what is urged might once have been to the Defence, it is no longer so now; the Decree treating the Sale by Two Executors to their Co-executor as a Breach of Trust. This cannot be distinguished from the common Case of Executors carrying on Trade.

The

1813.

BURDEN v. BURDEN.

The Lord CHANCELLOR.

Without putting the Case on any other Ground, I take it, that the Defendant must be considered as carrying on the Trade for himself and his Copartners. Even if he had carried on the Trade under Articles, he would not without an express Stipulation have been entitled to an Allowance for his Management, and Time. On the other Hand, what is urged as to his Expences appears material; as he proceeded on a Mistake; considering himself as sole Owner of the Trade. I consider him as entitled to those Expences; but not to any Allowance for his own Time and Labour. I take this to be the Distinction; and that, if a Man enters into Articles of Copartnership, and the Children are to succeed to the Share of their Parent, the surviving Partner is not entitled to an Allowance for carrying on the Trade. What is this but a Case of voluntary Management by a surviving Partner for himself, and the Children of a deceased Partner?

Let the Defendant hand over to the Plaintiff the Items of the Sums, actually expended by him; a Moiety of which he must be allowed: but nothing for his Management, Time, and Labour.

Lincoln's Inn Hall. 1813. *Jan.* 14, 22.

HILL *v.* COCK.

Devise after Payment of Debts, Legacies, &c. of specific, Freehold and Leasehold Estates to *A.* subject to Incumbrances: and of all other his Freehold and Leasehold Estates, together with all his personal Estate, to Trustees, to sell; and out of the Money in the first Place to pay their Expences in Execution of the Will or Trust; and without farther Disposition appointing the Trustees Executors.

A resulting Trust as to the Produce of the real Estate for the Heir at Law.

WILLIAM Farnham by Will, dated the 19th of *June*, 1800, after giving certain Annuities which he charged upon particular Estates, and devising the Estates so charged, bequeathed some pecuniary and specific Legacies; and after Payment of his Debts, Legacies, and Funeral Expences, devised other Freehold and Leasehold Estates, subject to the Mortgages and Incumbrances thereon unto *John Cock* (Son of his Relation) his Heirs and Assigns. The Testator then proceeded to give and devise unto *John Cock* and *John Lawrence*, their Heirs, Executors, Administrators, and Assigns, all other his Freehold and Leasehold Estates, together with all his personal Estates and Effects whatsoever, upon Trust as soon after his Death as they could, to vend, sell, and dispose of, his Freehold and Leasehold Estates, and also of his personal Estate and Effects to the best Benefit and Advantage; and out of the Money arising therefrom "in "the first Place" to pay and reimburse themselves all reasonable and necessary Costs, Charges, and Expences, whatsoever, which they should or might bear, pay, be put unto, or sustain, in or about the Execution of that his Will, or the Trust thereby in them reposed; and lastly he did thereby appoint his said Trustees *John Cock* and *John Lawrence* Executors of his Will.

By a Codicil, dated the 10th of *January*, 1802, the Testator bequeathed pecuniary and specific Legacies; directing, that they should be paid out of his real and personal Estate; with the Payment whereof he thereby charged and made the same liable.

The Plaintiff, the Representative of the next of Kin of the Testator, filed his Bill; on the Ground, that the Testator

1813 Hill v. Cock.

Testator died intestate as to such Part of his Property and Effects, of which no Disposition was expressly made.

The Cause was heard for farther Directions, upon the Master's Report; ascertaining the devised Estates and the Testator's next of Kin.

Sir *Samuel Romilly*, and Mr. *Wingfield*, for the next of Kin.

Mr. *Heald*, for the specific Devises *John Cock*, contended, that he was entitled to take the Estates devised to him, exonerated from Debts, citing, *Donnee* v. *Lewis* (a) *Wride* v. *Clark* (b), *Davies* v. *Topp* (c), *Manning* v. *Spooner* (d), and *Serle* v. *St. Eloy* (e).

Mr. *Richards*, and Mr. *Wear*, for the Trustees, contended, that an Heir cannot be excluded by Implication; but express Words are necessary; and cited *Ackroyd* v. *Smithson* (f), and *Mallabar* v. *Mallabar* (g).

Jan. 22.

The Lord CHANCELLOR.

The only Point, calling for Decision under this Bill, is, whether the Money, arising from the Sale of the real Estate, which it is not necessary to apply for the only Purpose, expressed in the Will, is to be considered real or personal Estate. This Case differs from any of the very numerous Cases, that have occurred upon this Point. The Rule in Equity is clear; that, where real Estate is directed to be converted into personal, for a Purpose expressed, which Purpose fails, either wholly, or partially, in the former Case, though the Estate has been converted, the whole Produce of that Conversion will still be real

Clear Rule in Equity, that, where real Estate is directed to be converted into personal for a Purpose, which fails either wholly or partially, to that Extent the Money is considered real Estate.

(a) 2 *Bro.* C. C. 256.

(b) 2 *Bro.* C. C. 260, in Note.

(c) 2 *Bro.* C. C. 259, in Note.

(d) 3 *Ves.* 114.

(e) 2 *P. Wms.* 385.

(f) 1 *Bro.* C. C. 503. *Brown* v. *Bigg*, 7 *Ves.* 279.

(g) *For.* 79.

Estates

Estate; and in the latter, as far as the Purpose fails, so far the Money is to be considered Realty, and not Personalty.

This Testator does not express, merely, that his real Estate shall be sold, and converted into personal: but he takes both Funds: the residuary real Estate, if I may use that Expression; every Devise of real Estate, though in Form residuary, being specific: he expressly includes Leasehold Estate, and all his personal Property, by express Description; directing the whole to be turned into Money; and to be applied in discharge of the Expences of the Trustees in the Execution of his Will; and, if there was nothing more in the Expression of the Purpose than the Satisfaction of those Expences, the Money remaining, unapplied, as not being required to answer that Purpose, would, as far as it was derived from real Estate, be considered as real, not personal, Property: the Principle being, that, where a Testator means with regard to a particular Purpose to convert his real Estate into personal, if that Purpose cannot be served, the Court will not infer an Intention to convert the Estate for any other Purpose, not expressed.

Devise of real Estate, though in Form residuary, is specific.

Where a Testator means to convert real Estate into personal for a particular Purpose, if that Purpose cannot be served, the Court will not infer any other Purpose.

It is said however, that, if a Testator simply directs the Conversion of his real Estate, expressing no Purpose whatsoever, with reference to which that Conversion is to be made, the Inference is necessary, that he had the Purpose of Conversion, and no other; and it is upon the whole Expression of this Will contended, that the Testator must have intended a Conversion out and out, as it is called; not only for the Purpose expressed; but using the words "in the first Place," and not afterwards expressing any ulterior Purpose, the next Purpose must be supposed to be merely that of making the Conversion. The Question therefore really turns upon the Construction of those Words "in the first Place;" lying in this narrow Compass; whether this Court will hold, that the Principle,

upon

1813. HILL v. COCK.

upon which hitherto Property, in the Form of Personalty, has been given to the Heir, shall be denied to this Case; as here are Words, which may import, that one Purpose was to convert with a View to discharge the Debts and Legacies; and, no other being expressed, he could have no other Purpose than the mere Conversion. These Words however may import, either that he meant to express that Purpose, and only the ulterior Purpose of mere Conversion; or, that, first expressing that Purpose, he had no Purpose beyond that, with regard to what might remain after satisfying the first Purpose, so expressed; and my Opinion is, that the Distinction upon these Words is much too slight to take this Case out of the general Principle. So much therefore of the Residue of this Money as arose from real Estate, must be considered as real; and be declared to belong to the Heir (a).

(a) See, upon Resulting Trust, *King* v. *Dennison*, *Post*.

LINCOLN'S INN HALL, 1813, *Jan.* 22.

ALCOCK, *Ex parte*.

Covenant in Marriage Settlement by the Husband, that he would upon a Month's Notice, or in the Event of his Default during his Life, that his Representatives would within a Month after his Death, transfer Stock, in Trust, &c.; in Bar of Dower, &c.: with a Proviso, that notwithstanding the Covenant to transfer upon their Request in Writing, it should be lawful for the Trustees, if they thought fit, to forbear requiring from him during his Life the Transfer.

A contingent Debt: not capable of Proof under a Commission of Bankruptcy against the Husband; no Transfer made, or Notice given.

BY Indenture, dated the 26th of *February*, 1810, made on the Marriage of *John Pooley Kensington* with *Anne Rawlins*, *John Pooley Kensington* covenanted

with

1813. ALCOCK, *Ex parte.*

with *Joseph Alcock* and *Edward Kensington,* that he, *John Pooley Kensington* would at any Time after the Solemnization of the intended Marriage, upon receiving from *Joseph Alcock* and *Edward Kensington* One Calendar Month's Notice for that Purpose, or in the Event of his Default during his Life that his Representatives would within One Calendar Month next after his Death, transfer to *Alcock* and *Edward Kensington* a Sum of £15,000 *Three per Cent. Reduced Annuities,* in Trust for *John Pooley Kensington* for Life, and after his Decease in Trust for *Anne Rawlins* for Life, and after her Decease in Trust for the Children of the Marriage, in such Shares and Proportions, as therein mentioned; and in case of no Children over; with a Proviso, that notwithstanding the Covenant of the Husband to transfer the £15,000 Stock to the Trustees upon their Request in Writing, it should be lawful for the Trustees, if they thought fit, to forbear requiring from him during his Life the Transfer of that Sum. It was declared, that the Husband might leave any equal or greater Sum by Will in Satisfaction; and that the Provision, thereby made for the Wife, was intended to be, and she did thereby accept the same, in Bar or lieu and Satisfaction of all her Dower and distributive Share in the real and personal Estates of her Husband.

There was Issue of the Marriage Two Daughters, *Anne,* and *Emily.* No Transfer was ever made of the £15,000 Stock: nor was any Notice given by the Trustees, requiring a Transfer.

On the 22d of *July,* 1812, a Commission of Bankruptcy issued against *John Pooley Kensington* and Co; under which they were declared Bankrupts. A Petition was presented by the Trustees under the Settlement; praying, that they might be admitted as Creditors against *John*

 Pooley

1813. ALCOCK, *Ex parte.*

Pooley Kensington for the Sum of £8437 : 10s. being the Value of the £15,000 Stock at the Date of the Commission.

Sir *Arthur Piggott*, and Mr. *Martin*, for the Petition.

The Debt was constituted by the Marriage ; which was the Consideration for it : and the Obligation to transfer on receiving One Month's Notice was merely for the Purpose of putting the Trustees into Possession of the Fund : effecting Payment of the Debt previously due. The Want of Notice, prior to the Bankruptcy, is immaterial ; Notice not being necessary to constitute the Debt. It was at all Events, and in the most absolute Sense of the Terms, *Debitum in præsenti solvendum in futuro*. The Trustees were invested with the Discretion to suspend the Notice; leaving the Husband in Possession of the Fund ; which Power amounted in Substance to this; that they might lend the Money to the Husband for Life. It is not unimportant, that the Wife agreed to accept this Provision in Bar of Dower : a valuable Interest, which she cannot be presumed to relinquish for a mere contingent Provision ; the Failure of which, if this Debt cannot be proved, leaves her utterly destitute.

Sir *Samuel Romilly*, Mr. *Hart*, and Mr. *Wilson*, for the Assignees.

This Debt is merely contingent, by the Want of Notice. In some Cases the Bankruptcy itself is Notice : but the Terms of this Settlement, requiring, that the Notice should be in Writing, preclude that. The Husband may be able to answer this Covenant ; as he may in the Course of his future Life acquire sufficient Property. This Case falls within those, where something must be done to constitute a Debt ;

1813.
ALCOCK, *Ex parte*.

a Debt; which not being done, no Debt arises. *King, Ex parte* (a), *Mare, Ex parte* (b).

The Lord CHANCELLOR.

I cannot doubt, that this was a pure contingent Debt at the Time of the Bankruptcy. If this is a Debt, it must be by Covenant. There is no Possibility of raising any implied Debt upon any Contract, except what is in the Deed. There are Three Ways of satisfying this Covenant: first, that the Trustees should give a Month's Notice; which having expired without a Transfer, there would be a clear Debt proveable: secondly, the words "in the Event of his Default during his Life," afford an Implication, that, if without Notice he had transferred, that would be a Satisfaction: but his Bankruptcy cannot possibly have the Effect of a voluntary Transfer. The third Mode is, that his Representatives should cause a Transfer to be made within One Month after his Death. That is purely contingent. I cannot adopt the Construction, put upon this Clause; that notwithstanding the Husband's Covenant to transfer the Stock upon such their Request in Writing, as aforesaid, it should be lawful for the Trustees, if they thought fit, to forbear requiring a Transfer from him during his Life. That was inserted for this Reason; that, were it is put upon Trustees to give a Month's Notice in Writing for the Benefit of the Family, the Trustees would always consider themselves in some Danger, if they did not give Notice. That is therefore inserted for their Protection; and is a Clause, upon which, if inserted with any other View, great Difficulty would arise in Bankruptcy; as giving an Option not to enforce Payment except upon the Approach of Insolvency; and Cases may be conceived, in which it would amount to Fraud.

Bankruptcy cannot have the Effect of voluntary Transfer of Stock under a Covenant.

Construction of a Clause, giving Trustees Liberty to forbear enforcing Payment; that it was for their Indemnity; as, if with a View to Insolvency, it might amount to Fraud.

(a) 8 *Ves.* 334. (b) 8 *Ves.* 335.

1813.

ALCOCK, *Ex parte.*

I say nothing upon the Right to Dower. If Dower is barred by this Settlement, it is not necessary to notice it: if not barred, there is no Question upon it before me. The Question is, whether this Covenant was broken before the Bankruptcy; and with great Regret I am bound to say, it was not.

LINCOLN'S INN HALL.
1812.
Dec. 14, 19.
1813.
Jan. 16.

METCALFE *v.* PULVERTOFT.

Receiver granted before Answer upon the Bill of a Purchaser *pendente lite:* viz. a Suit instituted by the Wife of the Vendor; claiming under a Settlement; voluntary, as being after Marriage.

BY Indentures of Lease and Release, dated the 14th and 15th *January*, 1807, the Defendant, *James Richard Pulvertoft*, conveyed certain Estates to the Use of himself for Life; with Remainder to the Use of his Wife *Sarah* for Life; with divers Remainders over to their Issue, and with Reversions in Fee to himself.

By other Indentures dated the 28th and 29th of *July*, 1807, the Defendant *J. R. Pulvertoft* mortgaged these Estates to the Defendant *Thomas Foster* to secure the Monies then owing to *Foster*, or thereafter to be advanced by him for the Defendant *J. R. Pulvertoft*.

By other Indentures, dated the 13th and 14th of *August*, 1807, *Foster's* Debt having been satisfied, the same Estates, with other Lands, were mortgaged to *Thomas Pulvertoft*; to secure £800. By other Indentures, dated the 31st of *May* and the 1st of *June*, 1808, *Foster* and *J. R. Pulvertoft* conveyed the same Estates unto *Thomas Pulvertoft* in Fee; in Trust by Sale of a competent Part of the Estates to satisfy himself his Debt of £800; and to convey the Remainder of the Estates to the Use of *Phelps* and *Bonner* and their Heirs during the Life of *Sarah Pulvertoft*, upon

Trust

Trust for her separate Use; with Remainder to *J. R. Pulvertoft* for Life, and Remainders, over; the ultimate Remainder being to the right Heirs of the Survivor of *J. R. Pulvertoft* and *Sarah* his Wife.

By other Indentures, dated 26th and 27th and the 28th and 29th of *June*, 1810, *Thomas Pulvertoft* having been paid off, the Estates became vested in *Phelps* and *Bonner*, to the Use of them and their Heirs during the Life of *Sarah Pulvertoft*, in Trust for her separate Use for Life; and after her Decease to the Uses declared in the Deeds of the 15th of *January*, 1807, and the 1st of *June*, 1808.

By Indentures, dated the 3d and 4th of *April*, 1812, a Suit having been instituted upon a Bill of *Sarah Pulvertoft* against her Husband, praying an Execution of the Settlement, and an Injunction to restrain him from selling or incumbering *James R. Pulvertoft*, in Consideration of the Sum of £4500, conveyed the Estates to the Plaintiffs in Fee, in Moieties. *Sarah Pulvertoft*, being then in Possession as well of the Estates, as of the Title Deeds, and threatening to cut Timber, the Plaintiffs immediately upon their Purchase filed their Bill; alleging, that the Settlements, being made after Marriage, were, except so far as related to the Mortgages to *Foster* and *Thomas Pulvertoft*, made without any valuable Consideration, and therefore void, as against the Plaintiffs, Purchasers for valuable Consideration; charging, that the Defendants took Advantage of their legal Estate to prevent the Plaintiffs proceeding at Law; and praying, that the Plaintiffs might be let into Possession of the Estates; that the Defendants might be restrained from setting up such legal Estate in Bar to any Action at Law, to be brought by the Plaintiffs; that the Defendants might deliver up the Title Deeds, and come

1812-13. METCALFE v. PULVERTOFT.

to an Account of the Rents, received by them; and that a Receiver might be appointed.

All the Defendants, with the Exception of Mrs. *Pulvertoft*, having put in their Answers, a Motion was made on the Part of the Plaintiffs for a Receiver.

Mr. *Leach*, and Mr. *Wakefield*, for the Motion.

Mr. *Haslewood*, for the Defendant, *Sarah Pulvertoft*.

This is an Application for a Receiver before Answer. *Vann* v. *Barnett* (a), and *Compton* v. *Bearcroft*, mentioned in Mr. *Brown*'s Note, are the only Cases, in which a Receiver has been appointed before Answer: but in *Vann* v. *Barnett* the Defendant's Affidavit was considered equivalent to an Answer; and the Circumstances of *Compton* v. *Bearcroft* do not appear. *Huguenin* v. *Baseley* (b), and *Lloyd* v. *Passingham* (c), were Cases of Fraud and Abuse of Confidence: but there is no Fraud in the present Case; the Settlement having been made on meritorious Consideration; nor is there any Certainty, that the Plaintiff will be ultimately entitled to Relief; a Circumstance to which the Court looks in appointing a Receiver. Perhaps the Wife might have put in a Plea in Bar to this Bill of *Lis pendens*; a Suit having been instituted by her to compel her Husband to carry into Effect the voluntary Settlement; in which Suit he filed a Demurrer; which was over-ruled (d). The Plaintiffs, therefore, having purchased *pedente lite*, must be taken to have purchased with full Notice; *Sorrell* v. *Carpenter* (e). Under such Cir-

(a) 2 *Bro. C.C.* 158.

(b) 13 *Ves.* 105, *and* 14 *Ves.* 273.

(c) 16 *Ves.* 59.

(d) The Demurrer was over-ruled upon the Form; as covering too much.

(e) 2 *P. Wms.* 482.

cumstances

cumstances the Court will not by appointing a Receiver strip this married Woman of her only Means of Defence and Subsistence.

Mr. *Leach*, in Reply.

It is not universally true, that a Receiver cannot be appointed before Answer. The Rule of the Court is, that a Motion for a Receiver cannot be made, as for an Injunction it may be, without Notice. The Question is, whether the Court will refuse that Relief, which the *Cestuis que Trust* are entitled to, merely on the Ground, that this Lady is interested? In a late Case (*a*), where after a voluntary Settlement the Setlor entered into a Contract to sell, the *Master of the Rolls* on mature Consideration decreed a specific Performance against the Parties, claiming under the voluntary Settlement. Admitting the *lis pendens* to be Notice, that under the Statute (*b*) is immaterial.

The Lord CHANCELLOR.

With respect to appointing a Receiver before Answer, I take it, that the Cases, where the Court has refused it, turned upon this; that the Party applying for the Appointment could not state, that he had, strictly speaking, an equitable Title. In the Cases, alluded to in the Argument, the Plaintiffs contended, that they were entitled to have the legal Estate conveyed to them freed from other Claims. In *Vann* v. *Barnett* the Receiver would not have been appointed, unless the Defendant had filed an Affidavit, shewing, in Substance, that the Plaintiff had an equitable Title. The real Question here is, whether this voluntary Settlement gives any Title whatsoever as against the Purchaser. If it has not the Effect of giving such

(*a*) *Buckle* v. *Mitchell*, at the *Rolls*.

(*b*) Stat. 27 *Eliz.* c. 4.

 Title,

1812.13. METCALFE v. PULVERTOFT.

Title, the Circumstance of the Mortgagees, joining will not avail against the Purchaser; insisting, that what the Defendants call the legal Estate is no legal Estate. If, however, the Estate has, as it is alleged, been purchased at a third Part of its Value, then according to the Case, decided by Lord *Mansfield* (a), that Purchase would not prevail against the voluntary Settlement. As this is a Case of some Nicety, I will peruse the Pleadings.

1813. *Jan.* 16.

The LORD CHANCELLOR made the Order; observing, that after the Decision of the *Master of the Rolls* upon the principal Point, that the Purchaser could compel an Execution of the Contract, he must have a Receiver.

(a) *Doe* on the Demise of *Watson* v. *Routledge*, *Cowp.* 705.

LINCOLN'S INN HALL. 1813, *Jan.* 19.

PHILIPS v. GIBBONS.

Order for Time to answer not corrected by extending it to the usual Order for Time to plead, answer, or demur, not demurring alone.

No Plea of Outlawry in a Suit for the same Duty or Thing for which Relief sought by the Bill:

THE Bill prayed, that certain Bills of Exchange might be delivered up to be cancelled; and the Defendants restrained from negociating them, and from proceeding at Law. An Injunction for Want of Answer issued. On coming in of the Answer the Plaintiff took Eleven Exceptions; pending the Reference of which to the Master the Defendants sued out a bailable Writ against the Plaintiff; upon which they proceeded to Outlawry.

Most of the Exceptions having been allowed by the

Master,

1813.

PHILIPS
v.
GIBBONS.

Master, the Defendants took an Exception to his Report; previous to which the Plaintiff had obtained an Order to amend; and that the Amendments and Exceptions should be answered at the same Time. The Defendants having on the 9th of *November* last obtained an Order "for Six "Weeks Time to answer," a Motion was made, that notwithstanding that Order they might be at Liberty to plead Outlawry in Bar to the Plaintiff's Suit; on the Ground, that the Order had been inconsiderately obtained; and ought to have been the usual Order to plead, answer, or demur, not demurring alone; and that at the Time the Order was obtained the Defendant's Solicitor was ignorant of the Outlawry.

Mr. *Hart*, and Mr. *Raithby*, opposed the Motion, on the Ground, that a Plea of Outlawry was within the express Terms of Lord *Clarendon*'s Order (*a*) wholly unavailable, where the same Duty, or Thing, for which Relief was sought by the Bill, had been in Issue; a Rule adopted by Lord *Redesdale* in his Treatise of Pleading (*b*); and the Case of *Roberts* v. *Hartley* (*c*) was mentioned.

(*a*) "A Plea of Outlawry, "if it be in any Suit for that "Duty, touching which Re- "lief is sought by the Bill, is "insufficient, *according to the* "*Rule of Law*; and shall be "disallowed of course; *as put* "*in for Delay*." Orders in Ch. p. 119. (Ed. 1698.) As to the Rule at Law, in a Writ of Error to reverse an Outlawry in that Suit, or at any Stranger's Suit, is no Bar; nor again in Attaint, brought on a Verdict, could Outlawry, grounded on that Verdict, be pleaded in Bar. (*Co. Litt.* 128, a. System of Plead. 300.) The Reason, upon which the Rule is founded, is said to be, that, if a Plea of Outlawry were allowed in these Cases, it would be *Exceptio ejusdem rei cujus petitur dissolutio.* (See Syst. Plead. p. 300. 222, and Authorities there cited.)

(*b*) p. 185.

(*c*) 1 *Bro.* C. C. 56.

Sir

1813.

PHILIPS v. GIBBONS.

Sir *Samuel Romilly*, in Support of the Motion, admitting, that no Answer could be given to Lord *Clarendon*'s Order, contended, that the Question at present was merely, whether the Defendants were not entitled to the usual Order.

The Lord CHANCELLOR observed, that the *Register* always proceeded to draw up the Order according to the Instructions, signed by Counsel (*a*); and there would be no End to Alterations in Orders, if the Court listened to Parties coming here to correct their own Mistakes; which he was the less disposed to do on the present Occasion; as the Plea of Outlawry seemed altogether unavailable.

No Order was made.

(*a*) See *Taylor* v. *Milner*, 10 *Ves.* 444.

1813.
Jan. 29.

PEACOCK *v.* THE DUKE OF BEDFORD.

An Amendment in the Title of an Answer being necessary, viz. instead of "the "farther Answer to the "original "amended Bill," entitling it, "the farther Answer to the original Bill "and the Answer to the amended Bill," the Answer, so amended, must in the Case of a Peer be again attested upon Honor; as in the Case of a Common Defendant it must be re-sworn.

THE Six Clerks having objected to file the Defendant's Answer on Account of the Manner, in which it was entitled, a Motion was made, that the Defendant may be at Liberty to amend the Title to the Parchment Writing, purporting to be the Answer to the Exceptions and amended Bill in this Cause, by striking out the Words, "The farther Answer of *John* Duke of *Bedford*, one of

"the

"the Defendants to the original amended Bill of *John* "*Pickering Peacock*, Esquire, Complainant;" and by inserting the Words, "The farther Answer of the De-"fendant *John* Duke of *Bedford* to the original Bill of "*John Pickering Peacock*, Esquire, Complainant; and "the Answer of the Defendant *John* Duke of *Bedford* "to the amended Bill of Complaint of *John Pickering* "*Peacock*, Esquire, Complainant;" and that the said Parchment Writing may be filed, after such Alteration in the Title of it, without its being again taken upon the said Defendant's Attestation of Honor.

Mr. *Newland*, in support of the Motion, distinguished this from the Case, where the Defendant was a Commoner; who might be indicted on his Answer for Perjury; and therefore the Plaintiff was entitled to have the Answer in such a Case re-sworn: and stated, that the Duke was in the Country, as a Reason for the Application for dispensing with his Attestation.

The Lord CHANCELLOR.

In the Case of a common Defendant, putting in an Answer with a wrong Title, the Court will not permit Amendment without re-swearing the Answer: the Security of the Plaintiff for the Truth of the Answer consisting in the Liabilities, incurred by the Defendant. A Peer certainly answers without Oath; but the Plaintiff has a Right to a similar Security in that Case; unless he has waived that Right. As in the Instance of a common Defendant therefore the Answer must be re-sworn, though it is as clear, as it is in this Case, that he intended to swear all, that was in the former Answer, so in the Instance of a Peer, the Security to the Plaintiff for the Truth of the Answer, being the Attestation upon Honor, he must have that Security to the altered Record in the same Manner.

MACHER

1813, *Feb.* 5.

MACHER *v.* THE FOUNDLING HOSPITAL.

Covenant against using Premises as a Shop, or Warehouse for any Trade, without Licence in Writing, or permitting any Thing, which may grow to the Annoyance or Damage of the Lessors, or any of their other Tenants.

Breach, though not a Nuisance in Law, public or private, being an Annoyance, not protected by Injunction: there being no Licence; and Permission of One Trade not to be construed a general Licence for any Trade; nor will the Court enter into a Comparison, which are more or less offensive.

Whether a Corporation, consisting of numerous Governors, would be bound by the Acquiescence of some, standing by, permitting Expenditure, &c. *Quære.*

THE Defendants having brought an Ejectment for Breaches of Covenant, the Plaintiff, who was the occupying Tenant by Assignment from a Sub-lessee, obtained under a Judge's Order a Particular; stating that by the original Lease the Lessee or Lessees, &c. covenant not to convert, use or occupy, nor suffer to be converted, used or occupied the said demised Premises, &c., into or for any Shop, Warehouse, or other Place for carrying on any Trade; nor suffer any open or public Shew of Business therein without the previous Consent in Writing of the Lessors; nor commit or permit or suffer to be done any thing upon the Premises, which may grow to the Annoyance or Damage of the Lessors, or of any of their other Tenants; that the Business of a Baker and a Baker's Shop hath been carried on in the Premises; and the Defendant (at Law) hath erected, &c. upon the Premises an Oven, used by him in the Way of his Trade or Business; which is to the Annoyance or Damage of such Lessors, or the other Tenants; and hath committed, &c. divers other Things upon the same Premises, which have grown to the Annoyance or Damage of such Lessors, or their Tenants.

No Licence in Writing having been produced at the Trial, a Verdict was given for the Lessor of the Plaintiff. The Bill stated, that the Sub-lessees, under whom the Plaintiff derived Title had successively carried on the Trades of a

Plumber,

Plumber, a Potatoe-dealer, a Green-grocer, and a Coal-dealer, upon the Premises in question: that since he purchased the Lease, he had expended nearly £600 in Repairs, and in erecting an Oven and the other necessary Buildings for his Trade: and that the Premises had been open and used as a Shop generally for Ten Years past; during all which Time the Defendants had without any Objection received the Rent; praying an Injunction against entering up Judgment and taking out Execution; and that the Plaintiff may be quieted in his Possession, and in carrying on his Trade.

The Answer insisted, that the Plaintiff's Business had been carried on to the great Nuisance and Annoyance of the Neighbourhood; the Smoke, issuing from the Bake-house Chimney, being injurious: that the Defendants had granted him no Licence: that, admitting, some of the Governors and Guardians of the Hospital, and their Secretary, did know, that the Work of erecting the Oven was going on, and did not object to it, the Number of their Governors was Five Hundred; and therefore such Omission to object on the Part of individual Governors of a charitable Corporation could not be considered as amounting to Licences by such Corporation to Tenants to do Acts in Breach of their Covenants; and which may materially tend to the Deterioration or Ruin of the Charity Estate; or as Waivers of the Forfeiture; especially as the Hospital had never received Rent from any but their own original Lessee; the Plaintiff being the Assignee only of a Sub-lessee.

Cause was shewn upon the Answer against dissolving the Injunction.

Mr. *Hart*, and Mr. *Roupell*, for the Plaintiff, contended, that the Defendants had Notice of the Alterations; and had

1813. Macher v. The Foundling Hospital.

had by their Acquiescence precluded themselves from objecting: that they had waived the Forfeiture; if it was one; and that the Act complained of was not a Nuisance.

Sir *Samuel Romilly*, Mr. *Bell*, and Mr. *Dowdeswell*, for the Defendants, insisted, that a Court of Equity could no more dispense with the Licence, necessary to prevent the Acts complained of working a Forfeiture, than a Court of Law could: that here there was a positive, unequivocal Breach, creating a Forfeiture; that the Defendants, as a Corporation, had no Notice: a few Individuals being alone acquainted with it; that the Corporation had objected the first Instant they were apprised of it; that the Act complained of was a Nuisance, materially injurious to the adjoining Property of the Hospital; and that, if not a Nuisance, it was certainly an Annoyance; which is all, that is necessary to bring it within the Terms of the Covenant.

The Lord Chancellor.

I have no Conception, that this Covenant cannot be considered as broken; unless the Act done amounts to a Nuisance in Law, either public or private: the Act prohibited being, using the Premises as a Shop, Warehouse, &c. for carrying on any Trade; or permitting to be done upon the Premises any thing, which may grow to the Annoyance or Damage of the Lessors, or of any of their other Tenants. If the Object of both Parties is so to consider the Meaning of this Covenant, that the Plaintiff shall carrry on his Trade, so conducted, as not to "annoy or "do Damage" to any other Tenants, it may be the Subject of Arrangement.

As to the Question, whether a Licence, given to open a Shop, is to have a different Operation here and at Law, it

Covenant not to assign without Licence, once dispensed with, the Condition is gone, both in Law and Equity; but the Principle questionable; and not to be extended: for Instance, to a mere Act; where the Licence is to be in Writing.

it has long been settled at Law (a) that, a Covenant not to assign without Licence being once dispensed with, the Condition is gone; and Equity has followed that (b). I should not have thought that a very good Decision originally; and, I think, here we ought to hesitate to say, that, if the Licence is to be in Writing, a mere Act, not establishing, whether the Party meant a Licence, general or particular, should be taken to be a general Licence: admitting therefore the Application of the Doctrine of Law in the Case, to which I allude. If however the Covenant is not to convert the Premises into a Shop, or to carry on a Trade without a Licence in Writing, I cannot conceive, that the Permission of the Lessor without Writing to carry on one Trade amounts to a general Licence for any Trade; as the good Sense is, and, if it is new, the Law ought to be, that you must infer from his Conduct, that the Lessor would have given in Writing that Sort of Licence, which it would have been prudent to give; and it cannot be represented, that a Licence to open a Shop for a particular Trade raises the Inference, that commencing with that Trade, the Lessee may afterwards carry on any other.

In this Case therefore I cannot from the Permission to carry on a particular Trade in this Shop conceive, that the Tenant may carry on any other; and a Court of Equity ought not to enter into a Comparison: and permit him to carry on some Trades, as less offensive than others.

The real Question is, whether from the Circumstance of Notice to some of the Members the Corporation can be considered as bound; having stood by, permitting Expenditure; and upon that it will be necessary to look very

(a) *Dumpor's Case*, 4 *Co.* 119.

(b) *Brummell* v. *M'Pherson*, 14 *Ves.* 173.

strictly

1813.

MACHER v. The FOUNDLING HOSPITAL.

strictly into the Answer. In the mean Time I wish the Defendants to consider, whether they would be disposed to put this Dispute in some Course of Arrangement, that may be satisfactory to them without turning the Plaintiff out of Possession.

END OF THE FIRST PART.

R. Wilks, Printer, 89, Chancery-lane, London.

CASES

IN

CHANCERY, &c.

1813, 51 *Geo.* 3.

1813. *Jan.* 26.

KENNET, *Ex-parte.*

Petition to disallow a Bankrupts Certificate, as void by Gaming: the Affidavits being in direct Opposition, the Certificate was allowed; with the View of giving an Opportunity to try the Fact at Law.

THIS Petition prayed, that the *Lord Chancellor* would disallow a Bankrupt's Certificate on the Ground, that he fell within the Provisions of the Act (a), which renders the Certificate void in Cases of Gaming.

The Affidavits on each Side were in direct Opposition.

Mr. *Cullen*, in support of the Petition.

Sir *Samuel Romilly*, for the Bankrupt, resisted the Petition on the Ground, that the Affidavits in support of it were not sufficient to stay the Certificate; which, if allowed, would not prevent the Party petitioning from trying the

(a) Stat. 5 Geo 2, c. 30. s. 12.

1813. KENNET, *Ex-parte.*

Fact of Gaming in an Action at Law: the Certificate being void, if there had been such Gaming, as the Act of Parliament prohibited.

The Lord CHANCELLOR.

The Ground of this Application is, that I should not grant a Certificate, which, if granted, will be void. In this Respect it differs from an Application to stay a Certificate, which, if granted, is admitted to be good. The Law has certainly said, that where a Man loses £5 in Gaming in the Course of a Day, his Certificate shall be void.

I perfectly agree, that this Court ought not to grant the Certificate, if it be clear, that the Law has in that Respect been violated: but then it ought to be clear; as, refusing a Bankrupt his Certificate, I refuse him the Trial of the Fact by a Jury. Amidst the contradictory Affidavits, that have been read, I cannot say, what the Fact is. I will, therefore, grant the Certificate; and it will then be for the Petitioner to avoid it at Law; or to indict for Perjury.

Costs were refused.

SAY

Rolls.
1812.
July.
Dec. 18.

SAY v. BARWICK.

Lease set aside with Costs; as obtained by the contrived and habitual Intoxication of the Lessor, immediately on coming of Age, at a very inadequate Rent; and Acts of Confirmation held not sufficient.

THE Object of this Suit was to set aside a Lease, granted by the Plaintiff to the Defendant.

The Bill stated, that the Defendant, with the Design of procuring this Lease from the Plaintiff at an inadequate Rent, prevailed upon him to go to the Defendant's House, and to different Public Houses in the Neighbourhood, almost daily for a considerable Time before the Plaintiff attained the Age of Twenty-one; on which Occasions the Plaintiff was by the Persuasion of the Defendant induced to drink to excess: that the Defendant, having during this Period obtained the Promise of a Lease, gave Instructions to an Attorney to prepare it; that the Day before the Plaintiff came of Age the Defendant kept him concealed from his Friends; prevailing on him to drink to Intoxication; in which State he returned Home at a late Hour; that, having been called up at an early Hour on the next Morning the 7th of *July*, 1809, the Day, on which he came of Age, he executed the Lease about Seven o'Clock; not being then recovered from Intoxication; that the Lease was at a grossly inadequate Rent: the Lands being let at a Rent of Twelve Shillings an Acre, though worth Twenty or Thirty Shillings.

The Answer represented, that, the Defendant being turned out of his Farm, the Plaintiff's Father, with whom he lived on Terms of Intimacy, had promised to let him have a Farm; that the Plaintiff in *October*, 1808, repeated that Promise: and about a Month after executing the Lease pointed out a Mistake in spelling his

 Name;

1812. SAY v. BARWICK.

Name; proposing to the Defendant, that it should be rectified by the Attorney; and had the Counterpart corrected accordingly. The Answer denied the Charges of Inadequacy; that the Intoxication was occasioned by the Defendant's Contrivance; that he had instructed the Attorney to prepare the Lease; that the Plaintiff was intoxicated when he executed the Lease, &c.

The Plaintiff's Evidence stated his almost incessant Intoxication in the Company of the Defendant for more than Twelve Months previous to the Execution of the Lease; that the Plaintiff spent little of his Time at Home; being chiefly at the Defendant's House; generally returning Home in a State of Intoxication; that he declared, he was in bad Hands; and could not get out of the Difficulty: that he was very much intoxicated on the Evening, preceding the Day of his coming of Age: and continued so on the Morning of that Day. The Depositions stated the Value of the Farm to be from £86 to £100 a Year: the Rent reserved by the Lease being only £51.

The Defendant's Evidence stated the Promises of the Plaintiff and his Father to provide the Defendant with a Farm; that the Plaintiff gave Instructions to the Attorney to prepare the Lease; that at Six o'Clock of the Morning, on which the Defendant came of Age, he called up One of the Witnesses; and sent him to the Attorney, who prepared the Lease; desiring, that he would come directly; that the Lease was executed between Six and Seven o'Clock on that Morning; that it was read over before Execution; that the Plaintiff, though addicted to drinking, was perfectly sober at that Time; that after the Execution he declared himself satisfied; and Six Weeks after granting the Lease consulted the Attorney, whether the Mistake in spelling the Name, which, he said, he had observed in looking over the Lease by himself, would

would make it void; as he was determined, that the Defendant should have a Lease; and that the Plaintiff personally delivered Possession of Part of the Property to the Defendant on the 11th of *October*, 1809.

Sir *Samuel Romilly*, and Mr. *Horne*, for the Plaintiff.

The Consideration for granting this Lease is grossly inadequate: the Rent reserved being barely Half the Value: but, attending to the Circumstances under which the Lease was executed, that is not surprising. For many Months antecedent to the Plaintiff's coming of Age he was kept in a State of Intoxication, if not, continual, certainly habitual, and produced by the Defendant's Contrivance. The Case amounts to this: habitual Intoxication of an Infant, in the Company of the Defendant, taking Advantage of the Influence, thus gained, to obtain a Lease at Half its Value. Considerable Suspicion would be thrown upon the Transaction, if in other Respects apparently fair, by adverting to the Time, when it took place; between Six and Seven in the Morning of the very Day, on which the Plaintiff came of Age; almost the first Moment, when the Law allowed him to execute a binding Instrument. There is not in the Evidence a single Instance of Intoxication not in the Defendant's Company. In all the Cases, where Instruments have been set aside as obtained in a State of Intoxication, it has been esteemed very material to ascertain, how that Intoxication was produced (a). It is true, here is no Evidence, who paid for the Liquor, drank by the Parties: but at the Defendant's House, where the Plaintiff was frequently intoxicated, the Expence must have been defrayed by the Defendant; and the Plaintiff, as an Infant, not being liable for the Liquor, drank at the Public House, the Defendant must be presumed to have b[illegible]n at that Ex-

(a) *Cooke* v. *Clayworth*, 18 *Ves.* 12.

1812.

SAY v. BARWICK.

pence also. The Plaintiff is proved to have been actually intoxicated, or so stupified from previous Inebriation, as to be prefectly inadquate to judge upon the Propriety of what he did, at the very Moment he signed the Lease, which this Suit seeks to set aside; and that Intoxication was produced by the Management and Contrivance of the Defendant. *Johnson* v. *Medlicott (a)*, *Griffin* v. *Deveuille (b)*, are clear Authorities for the Relief.

Mr. *Hart*, and Mr. *Dowdeswell*, for the Defendant.

Though the Plaintiff at the Period of his coming of Age, and previously, lived at his Mother's House, he was liberated from all Controul. He sought the Society of the Defendant, and those of a similar Rank in Life. The Plaintiff's Friends were not ignorant, that he proposed to do an Act of Service to the Defendant. The original Transaction under all the Circumstances in Evidence is not a Case for Relief; but, admitting that, it is now precluded by the subsequent strong Acts of Confirmation: especially by correcting the Error in the Lease, and personally delivering Possession, The Case cannot turn on Inadequacy of Consideration; as the Plaintiff might have given away the Property; instead of leasing it; had he been so disposed.

Sir *Samuel Romilly*, in Reply.

This is a Case of Intoxication, produced in the Minor, which had not ceased in the Adult. The Instructions for the Lease, given under both Disabilities, designed Intoxication and Infancy, ought at least to have been repeated,

(a) Note (a) to *Osmond* v. *Fitzroy*, 3 *P. Wms.* 130.

(b) In Mr. *Cox's* Note to *Osmond* v. *Fitzroy*, 3 *P. Wms.* 131.

peated, when he was of full Age, and sober. The Evidence establishes, that the Plaintiff had been practised upon: nor will the supposed Acts of Confirmation, tainted with the Vice of the original Transaction, avail the Defendant.

1812.

SAY v. BARWICK.

The MASTER *of the* ROLLS.

Dec. 18.

The Object of this Bill is to set aside a Lease, which upon the Morning of the Day, on which the Plaintiff came of Age, he executed to the Defendant. The Allegation of the Plaintiff is, that some Time before he came of Age he had been almost daily induced by the Defendant to drink to excess: sometimes at Public Houses: sometimes at the Defendant's own House; and that Advantage was taken of his Youth and Inexperience, and the Habit of Intoxication, into which he had been seduced, to prevail on him to grant this Lease at an inadequate Rent, and under unusual and disadvantageous Covenants. The Defendant's Representation is, that the Plaintiff's Father had promised the Defendant a Lease; which Promise was renewed by the Plaintiff; and that the Rent was not inadequate; but as good as could have been obtained from any other Tenant.

There is a great deal of Evidence on both Sides as to the Plaintiff's Habits of Life for a considerable Time, before he came of Age; and as to the Degree, in which the Defendant had been instrumental in producing and encouraging those Habits. The Plaintiff upon the whole appears to have passed much of his Time in drinking in Company with the Defendant; who, if he did not entice, was always ready to accompany, the Plaintiff to Public Houses: as well as to receive him, and supply him with Liquor at his own House; and that the Plaintiff most com-

1812.

SAY
v.
BARWICK.

monly went Home in a State of Intoxication after having been in Company with the Defendant. It appears, that they passed together the greatest Part of the Day, preceding the Execution of the Lease; that the Plaintiff returned Home intoxicated at Night; but directed, that he should be called at Five the next Morning; that he did get up at an early Hour; and went to the Defendant's; where the Lease, which had been previously prepared, was executed about Seven in the Morning. Different Representations are given as to his State at the Time of the Execution. Some Witnesses say, he was so much affected by the former Night's Debauch as to be utterly incapable of Business: others represent him as perfectly cool and collected; and aware of what he was about. My Impression is, that he did know what he was doing; and that what he did was merely an Execution of what he had previously promised and determined to do; through what Inducements he had formed his Resolution is a different Consideration. There are several Witnesses to repeated Declarations of his Intention to give the Defendant a Lease of this Farm; but there is only One, (the Defendant's House-keeper,) who makes the Plaintiff ascribe that Intention to a Compliance with the supposed Wish of his Father. She makes him say, that his Father had charged him to be kind to the Defendant; and that he would let him have the *Swan* Farm. But, whatever might have been the Inducement in the Mind of this Infant, (for such he was) to promise in general Terms a Lease to the Defendant, the Question remains, what Sort of Lease he was ever intended to have. The Plaintiff's Father is stated to have felt Concern, that the Defendant should lose the Farm he had before occupied, and be obliged to remove from the Neighbourhood. The Inference is, that he intended only to give him the Benefit of another Lease; such as any other Tenant would have; and the Answer insists, that this Lease is at as high a Rent as any other

Tenant

Tenant would give; precluding the Supposition, that it was ever intended, and agreed, that the Defendant should have a Lease at a great Undervalue.

Now this Farm is proved to be let at not much more than Half its Value. The Rent reserved is £51. By the lowest Estimate it is worth £86, and some of the Witnesses say, it is fairly worth £100. The Covenants are not so advantageous to the Landlord as is usual in the Part of the Country, where the Farm lies: and no Evidence whatever of the Adequacy of the Rent is given by the Defendant. The Plaintiff therefore in granting a Lease on such Terms must either have acted in total Ignorance of the Value of his Estate, or he must have been imposed upon with regard to it. This must to all substantial Purposes be considered as the Lease of a mere Infant. The Seal certainly was put to it a few Hours after he was of Age: but the Agreement was made, the Terms were settled, the Instructions given, the Engrossment prepared, during his Infancy. He had not for a single Hour the Opportunity of applying his adult Judgment to the Subject.

Stripping this Case of all other Circumstances, can a Lease, thus disadvantageous, and obtained in such a Manner, be permitted to stand; unless it has since, with full Knowledge of all the Circumstances, been deliberately confirmed? With regard to that there is Evidence, that the Plaintiff subsequently declared himself satisfied with what he had done: that about Five Weeks afterwards he pointed out to the Attorney, who drew the Lease, a trifling Mistake in it; and said, that, if necessary, he was ready to execute it over again; and farther, that on the 11th of *October*, which was about Three Months afterwards, he put the Defendant in Possession of the Farm. These are the confirmatory Circumstances insisted on; but it is not at all shewn,

1812. SAY v. BARWICK.

shewn, that at either Period the Plaintiff was apprised of the true Value of his Estate; and consequently of the Degree, in which the Lease was injurious to him; and at the latter Period he was living at the House of the Defendant, and in the same Habits, as at the Time of making the Lease. Very soon after he quitted the Defendant's House the present Bill was filed. Under these Circumstances I think there is nothing amounting to Confirmation. Consequently the Lease must be set aside; and the Defendant must pay the Costs of the Suit.

1812, *Nov.* *Dec.*

HOWARD *v.* BRAITHWAITE.

Specific Performance of a Contract concerning Land not decreed on the Signature of an Agent without Authority. The Question as to his Authority, denied by the Answer, and by his Deposition, stating his Declaration to the contrary at the Time of Execution, to be determined by an Issue: the Evidence of a Witness, impeaching the Instrument he has attested, as a Witness to a Will, denying the Sanity of the Devisor, &c. being admissible; but to be received with the most anxious Jealousy.

BY Indenture, dated the 9th of *November*, 1803, *Timothy Stonehouse Vigor* and *George Vansittart*, Lessees under the Dean and Collegiate Church of *Westminster*, granted an Under-lease to the Plaintiffs of an Estate at *Westbourn Green* in the County of *Middlesex* for the Term of Twenty-one Years commencing the 29th. of *September*, 1804; if certain Lives or any other Person, for whose Life *Vigor* and *Vansittart* should hold the Premises should so long live, at the Rent of £800 *per Annum*.

In the beginning of 1804 the Defendant entered into a Negociation with the Plaintiffs; proposing to take from them an Under-lease of a Part of the Estate, consisting of One Hundred and Thirty Acres; and at his Instance, being desirous of procuring a greater Term, the Plaintiffs

applied

applied to *Vigor* and *Vansittart*; who consented to sell the whole of their Interest to the Plaintiffs for £12,300, £3300 to be paid at the Execution of the Conveyances, the Remainder to continue on Mortgage. The Negociation proceeding between the Plaintiffs and the Defendant, on the 31st of *October*, 1804, a Meeting took place at the House of the Plaintiffs' Solicitors; the Defendant being attended by his Solicitor; when it was agreed, that the former should prepare, and send to the latter, the Draft of an Agreement: but, the Defendant afterwards objecting to contract with the Plaintiffs, until it was ascertained, whether they could agree with *Vigor* and *Vansittart* for the Purchase of their Interest, it was on the 29th of *November*, 1804, agreed, that the Defendant should be substituted for the Plaintiffs in the Contract, which they had proposed to enter into with *Vigor* and *Vansittart*; and the 19th of *December*, 1804, being fixed for the Execution of that Contract, a Meeting took place by Appointment on that Day, previously, at the House of the Plaintiff's Solicitor; which was attended by the Plaintiff *Charles Edward Howard*, and by the Solicitor of the Defendant; who was not present at that Meeting. An Agreement was drawn up by the Solicitors, entitled "Heads of "an Agreement, made this 19th Day of *December*, 1804, "between *John Braithwaite* and *Barnard Edward* "*Howard* and *Edward Charles Howard*;" by which, reciting, that the Defendant was in Treaty with *Vigor* and *Vansittart* for the Purchase of their Interest, the Defendant agreed in Consideration of the Plaintiffs surrendering up to him, after he should have completed his Purchase from *Vigor* and *Vansittart*, the whole of the Premises with the Exception of certain Parts amounting to Thirteen Acres, to grant a Lease of the excepted Premises to the Plaintiff *Edward Charles Howard* for Seventy-eight Years, commencing after the said Term of Twenty-one Years, at a Pepper-corn Rent; renewing such

1812. HOWARD v. BRAITHWAITE.

such Lease from time to time for Ninety-nine Years, whenever a Renewal should be made with the Dean and Chapter by the Defendant; and in case the Defendant should make a Purchase from the Dean and Chapter, he undertook to execute a Conveyance to the Plaintiff *Edward Charles Howard* and his Heirs.

This Agreement was signed by the Solicitor for the Defendant; and afterwards on the same Day the Defendant signed an Agreement with *Vigor* and *Vansittart* for the Purchase of their Interest at £12,200, to which the Defendant's Solicitor was a subscribing Witness. The Conveyance and Assignment necessary to carry this Agreement into Effect were afterwards executed.

The Bill prayed, that the Agreement of the 19th of *December*, 1804, signed by the Agent of the Defendant, might be specifically performed; or, in case it should appear, that the Agent was not properly authorised to sign that Contract on behalf of the Defendant, then that it may be declared, that the Conveyance of the Estate and Interest of *Vigor* and *Vansittart* to the Defendant was obtained by Fraud and Misrepresentation; and that he may be declared a Trustee for the Plaintiffs, and be decreed to assign to them the Estate and Interest so acquired by him.

The Defendant by his Answer admitted the Execution of the Agreement by his Solicitor, stated to be his legal Agent merely: and that the Arrangement of the Terms of the Agreement was confided to *Ashton*, his Surveyor alone; but positively denied, that the Solicitor was the authorized Agent of the Defendant to execute such Agreement; and stated, that after the Execution of the Agreement with *Vigor* and *Vansittart*, when the Defendant was first informed of the Agreement, executed by his Solicitor, which was in many Respects contrary to the Instructions,

Instructions, given by the Defendant, he immediately declared, that he would not confirm it; as being signed without his Knowledge or Consent, and contrary to the Terms, prescribed by him.

The Solicitor in his Depositions stated himself to be the mere legal Agent of the Defendant; that *Ashton* was solely relied upon by the Defendant to arrange the Terms of the Agreement: that the Deponent was never authorized by the Defendant or by any other Person on his behalf to sign or execute on his Part the Agreement of the 19th of *December*; or any Paper-writing whatever: that the Deponent did consent to sign such Agreement at the express Desire and Persuasion of the Plaintiff *Edward Charles Howard* and his Solicitor, upon their positive Declaration and Assurance, that *Ashton* had perused the Agreement as it then stood; and had approved of it on the Part of the Defendant; with the Truth of which Assertion the Witness was impressed: that previously, and at the Time he so signed the Agreement, he informed the Plaintiff *Edward Charles Howard* and his Solicitor, that he, the Deponent, had no Directions or Authority whatever to sign the same on the Part of the Defendant; and that, having made such Declaration, he did not conceive, that his Signature was binding upon his Client; and the more so as the Plaintiff *Edward Charles Howard* not only signed his own Name to the other Part of the Agreement, but also signed the Name of the other Plaintiff *Barnard Charles Howard*, without producing, or, as the Witness believes, having, any Authority so to do: that prior to his signing the Agreement the Plaintiff *Edward Charles Howard* and his Solicitor expressed great Anxiety, that the Deponent should sign it; by way as they alledged of settling the Business One Way or the other; and, to induce him to sign, the Solicitor in the Presence of the Plaintiff *Edward Charles*

Howard

1812. HOWARD v. BRAITHWAITE.

Howard stated to the Deponent, that he need not have any Objection; as the Agreement had been perused by *Ashton*.

Sir *Samuel Romilly*, and Mr. *Bell*, for the Plaintiffs, contended, that the Defendant's Solicitor by signing the Agreement held out to the World, that he had Authority; comparing it to the Case of Witnesses to a Will, by their Signature giving Authority to believe, that the Testator was sane, &c.; and, though they may be admitted afterwards to contradict that, Courts of Justice very reluctantly receive such Evidence; and would not recommend a Jury to find a Verdict upon it; that the Defendant's Solicitor was to be considered as a general Agent; and the Cases of Agents with limited Authority had no Application; the Decree therefore ought to be pronounced as upon a legal Agreement by a Person properly authorized within the Statute of Frauds.

Mr. *Richards*, Mr. *Hart*, and Mr. *Wingfield*, for the Defendant.

The Lord CHANCELLOR.

This Case involves several very considerable Points: One of great Importance; to which for that Reason I shall turn my attention the last: as, if upon the whole Case, in Allegation, Proof and Admission, I can regard this as One Transaction, in which the Parties were endeavouring to acquire what I shall call, inaccurately, the Inheritance, with the View, that One should have the Property, and the other a Lease; if the Terms are clearly to be collected; so that I can consider the whole, including Two Agreements, as One Bargain, no written Agreement between these Parties was necessary; but then I must collect from the Record the Terms of both Contracts

1812.

HOWARD *v.* BRAITHWAITE.

Contracts. If the Case is not to be viewed in that Light, the next Consideration is, whether the Inheritance has not been obtained by the Defendant under such Circumstances, attending to the whole Transaction, in dealing with each other, and as this Acquisition of the Inheritance actually took Effect, that I can infer an Obligation by the Defendant upon good Faith to hold the Benefit he has acquired, not for himself, but in Trust for others; unless he will agree to some reasonable Lease, which they will accept; and I am not satisfied, that sufficient Authority has been laid before me for saying now, that there are not great Difficulties in deciding those Questions affirmatively.

Upon the third Question, while there is any Hope of Arrangement, it is only necessary to say, that it will not be decided without sending it to another Tribunal.

Provisions of the Statute of Frauds as to the Execution of Contracts concerning Land and Devises.

The Statute of Frauds *(a)* says, that no Man shall be bound by an Agreement concerning Land, unless the Agreement is to be found in some Writing, signed by himself, "the Party to be charged therewith;" or by some Agent, "thereunto," that is, as I understand it, to the signing thereof, lawfully authorized by such Party. Therefore, laying out of Consideration the Cases of Part-performance, an Agreement for the Purchase of an Estate is not binding, unless signed by the Party, to be charged, or by some Person, lawfully authorized by him thereunto: that is, to the signing.

This Statute has also, with reference to Persons, who are to attest Wills, said *(b)*, that no Devise of Land shall be good, unless it is attested by Three or Four Witnesses; and the same Clause states, that the Signature

(*a*) Stat. 29 *Ch.* 2. c. 3. s. 4.

(b) Section 5.

of

1812.

HOWARD
v.
BRAITHWAITE.

of the Party himself is not necessary: but the Will must be signed by him, or by some other Person in his Presence, and by his Direction. With respect to a Class of Cases, referred to on the Part of the Plaintiff, I think, that judicial Opinions against giving Credit to Persons, who, having attested Wills, are afterwards called to impeach the Execution, has been carried rather too far. Lord *Mansfield* often said, he would hear those Witnesses; but would give no Credit to them. Lord *Kenyon* followed him in that. I have differed from both those great Judges; and have acted upon my Opinion to this Extent; that, if the Witnesses are to be heard, their Credit is to be duly examined; but their Testimony is to be received with all the Jealousy, necessarily for the Safety of Mankind attaching to a Man, who upon his Oath asserts that to be false, which he has by his solemn Act attested as true. Every Circumstance therefore is to be regarded with a strong Inclination to believe, that what he did was right; and that he swears under a Mistake: but if it is established, that the Testator was not sane, that the Agent was not authorized, the Law has not empowered any Judge to refuse to give Effect to that.

In this View the Case is of extreme Importance: but in a Bill for the specific Performance of an Agreement you must charge the Agreement to have been signed, if not by the Party, by an Agent, lawfully authorized; and how can a Decree be obtained without Admission, or Proof, that he was lawfully authorized? The Doctrine would be new, and is not stated here, that the mere Production of an Instrument, purporting to be signed by a Man, not having a general Authority, but acting *in hoc Casu* upon a special Authority, is to be taken as Proof of general Authority; though that is positively denied by the Defendant's Answer, and by the Deposition of the Person

Person, represented as having such Authority. That is not Doctrine, upon which a Court of Equity can proceed.

1812.
HOWARD
v.
BRAITHWAITE.

If the Question, whether the Defendant's Solicitor was an Agent, duly authorized according to the Statute to the signing of this Agreement, was sent to Law, I have no Doubt, a Judge would tell the Jury, they must look at his Evidence with the most anxious Jealousy; that the Safety of Mankind requires it; and, giving him Credit for the Belief, that he thought himself correct in making this Deposition, he cannot, I conceive, now think it quite accurate; and a Judge cannot possibly so describe it.

If therefore it rested merely upon the Evidence of this Agent, his Deposition must be examined, distinguishing his Declaration, that he had no Authority to sign: the Fact, independent of that Declaration, must be examined with the Jealousy, that I have stated much lower than the Judges I have mentioned; and with due attention to all the Circumstances, the Probabilities of what must have passed on that Day, and the Circumstances, belonging to the Fact, that the Defendant, who was to have been present, was absent, all the prior Circumstances, and the subsequent Circumstance, that for Ten Days no Representation was made to the Plaintiffs, that this Agent had no Authority; which was the more incumbent, if *Ashton's* Conception of the Imposition, practised upon *Howard*, was infused into the Mind of that Agent; and was not acted upon for Ten Days.

Distinction between a general and special Agent as to their Powers to bind the Principal.

Whether a Man is a general, or a special, Agent, and admitting the Difference of the Principle, governing the Question, how much farther one can bind the Principal than the other can, it is impossible, supposing a special Agent can bind beyond his Authority, to contend, that if he

1812.

HOWARD v. BRAITHWAITE.

Auctioneer may limit his general Power of Agency; but only by Declaration, equivalent in legal Effect to the general Authority. Upon that Principle Evidence of loose Declarations at the Sale not admitted.

he made at the Time a Declaration, that he had no Authority, the Principal can be bound. So in the Case of a general Agent, as an Auctioneer, he may at the Auction state, what Limitations are imposed on his general Power of Agency: but that Declaration must be of such a Nature that the Law will affect the Person, to be affected by it, as he would be affected under the general Authority. Upon this Principle loose Declarations at a Sale by Auction are not permitted to be proved by parol Evidence.

I do not deny, that the Supposition, that the Agent made this Declaration, renders the whole more improbable, than otherwise it would be; yet I am not satisfied that he made no such Declaration; and, if it is established, that he had not the Authority, though he honestly believed he had it, the Ground for decreeing a specific Performance fails.

When I state my Opinion, that an Issue is necessary; my Impression is, that under all the Circumstances of such a Case as this, the Credit both of the Defendant and the Witness will be much better appretiated by a Jury, duly informed by a Judge as to the Principles of Law, than they can be by me, upon any Attention I can give to the Proofs in the Cause; and I think more Issues than One will be necessay; as if the Jury should find, that this Person was not authorized to sign this Agreement, I am not sure, that the Defendant, if the Signature did not bind him, may not be bound by his Conduct; the Circumstances of his Absence, unaccounted for, and no Objection made by him for Ten Days, having regard to the Nature of the Transaction, and the Benefit, acquired by him in the mean Time by Negotiation, which if not connecting itself with, embraced both

Bargains,

1812. HOWARD. v. BRAITHWAITE.

Bargains, may be usefully put to the Jury; whatever should be their Verdict upon the first Issue.

If therefore the Parties do not come to some Arrangement, which is very desirable, I shall endeavour to decide the Two first Questions: if either of those should be in the Plaintiff's Favor, it will not be necessary to determine the third; which cannot be decided here with so much Propriety as before a Court, who can look more accurately to the Facts and the Credit of the Witnesses, than I can.

1812. *Dec.* 22. 1813. *Feb.* 1.

BRYANT, *Ex parte*.

THIS Petition was presented by a Bankrupt; praying that the Commission may be superseded.

No Appeal from the *Lord Chancellor* in Bankruptcy.

Bankrupt, disputing the Commission, having failed in One Action, not restrained, as upon vexatious Conduct, from bringing another; but not directed without a new and special Ground: the Costs of the Assignees out of the Estate.

Trading in the Instance of an Attorney buying and selling Bo[illegible], whether sufficient to support a Commission; depending upon whether the Nature of the Dealing, however small, is such as to manifest an Intention to deal generally.

Omission of the Affidavit of Debt upon taking out a Commission of Bankruptcy to state a Judgment obtained for the Debt, originally by Specialty or simple Contract, forms no Objection to the Commission.

Commission of Bankruptcy supported upon a Debt, for which a Judgment was obtained pending the Two Months Imprisonment for Debt, constituting the Act of Bankruptcy. Distinction as to a Bond taken; which would be void by relation to the Commencement of the Period.

Ground for superseding a Commission of Bankruptcy, that a Part of the Bankrupt's Property will satisfy all the Debts; taking care to secure that Object immediately and effectually.

The

1812-13.

BRYANT, *Ex parte.*

The Bankrupt disputing the Commission upon all its Grounds, the petitioning Creditor's Debt, the Trading and the Act of Bankruptcy, the *Lord Chancellor* directed an Action to be brought; and the Commission was established by the Verdict; and an Application for a new Trial was refused.

The Bankrupt, being still dissatisfied, in Person pressed the *Lord Chancellor* for a farther Investigation by directing another Trial, or in some other Way; and that the Examination may in the mean Time be stayed; insisting, that there was not sufficient Proof of Trading; which was represented to be by buying and selling Books; the Bankrupt being an Attorney and Solicitor; that the Affidavit of the petitioning Creditor on suing out the Commission stated his Debt as upon simple Contract though he afterwards proved upon a Judgment; that the Judgment having been obtained after the Commencement of the Imprisonment for Debt, which constituted the Act of Bankruptcy, the Debt was by relation subsequent to the Act of Bankruptcy; that the Creditor, by proceeding at Law had made his Election; and could not sue out a Commission; and that the Bankrupt was solvent; and was willing and able by the Sale of a particular Estate to pay his Debts.

Mr. *Richards*, and Mr. *Montague*, for the Assignees, represented the Bankrupt's Conduct as vexatious and oppressive; that there was no Foundation for any of the Objections; which were properly disposed of by the Result of the Action; that the Bankrupt's Title to the Estate alluded to was disputed; and that under these Circumstances he should be restrained from farther Resistance to the Commission; which had been issued Two Years; and that the Examination should proceed.

The

The Lord CHANCELLOR.

Upon the different Objections, on which this Petition sought to supersede the Commission, I directed an Action to be brought. First, with regard to the Trading, it is obvious, that the Question, whether the Nature of the Dealing, however small, is such as to manifest an Intention to deal generally in the Article, is a Question of so much Delicacy, that it is peculiarly fit for the Consideration of a Jury. Difficulties were raised also upon the petitioning Creditor's Debt; and upon the Act of Bankruptcy, lying Two Months in Prison, as connected together; and, the Bankrupt having failed in that Action, I adopted the constant, uniform, Course, as I could not give Costs against the Bankrupt, to allow those Persons, who succeeded in sustaining the Commission for the Benefit of all the Creditors, to take their Costs out of the Estate.

It is contended upon the Objection to the petitioning Creditor's Debt, that a Judgment, obtained after an Act of Bankruptcy, is to be considered in quite a different View from a Bond, so taken; as to which it has been long settled, that a Bond, taken after an Act of Bankruptcy for a pre-existing Debt by simple Contract, would not merge that Debt *(a)*; for this Reason; that by the Act of Bankruptcy the Bond is a Nullity: the Person, who gives it, is incapable of executing such an Instrument; and the Consequence is, that the Debt by simple Contract remains unaffected. It is urged however, and with Weight, that this is not so, where the Creditor proceeds to a Judgment, particularly a Judgment *in invitum*. The Bond is taken from a Man, not known to be a Bankrupt: but a Judgment is obtained from a Man in Prison, with the

(a) See 1 *Cooke* Bank. Law, 19. (Ed. 1804.)

1812-13. BRYANT. *Ex parte.*

Object of getting a better Security, and founding an Act of Bankruptcy upon that Imprisonment. All these Questions were the proper Subject for an Action at Law; which were either disposed of, or, if not brought before the Court, that is not the Fault of those, who sustain the Commission.

The Objection, taken to the Affidavit of the petitioning Creditor's Debt on suing out the Commission, is, that stating the Consideration; as supporting the Allegation of Debt, the Affidavit imports, that it is a Debt by simple Contract. The Bankrupt contends, that it is not so, but a Debt by Judgment; and it is insisted, that the Act of Parliament *(a)*, directing, that the Creditor shall make Affidavit of "the Truth and Reality" of his Debt, requires, that he shall describe the specific Nature of the Debt, such as it is: it is farther said, that, when this Creditor proved his Debt under the Commission, he referred to the Judgment; and it is insisted, not only that he must state his Debt in his Affidavit, as I have represented; but coming to prove under the Commission he must prove a Debt of the same Nature, as well as the same Amount, as that contained in his Affidavit. That is not the true Construction of the Act of Parliament, and is inconsistent with the Practice, which has prevailed many Years. Proof upon a Judgment will not stand merely upon that, if there is not a Debt due in "*Truth and* "*Reality*;" for which the Consideration must be looked to. The Creditor's Omission to mention the Judgment would not prevent the Commission; as the Court is to be satisfied by the Affidavit, that there is a true and real Debt; and it has never been required, that the Affidavit should state the Debt with the Precision of a special Pleader, bringing an Action upon it; having regard to all the Se-

(a) Stat. 5 *Geo.* 2. c. 30. s. 23.

curities

curities at the Moment. That was never considered necessary; and there is hardly an Instance, in which it has been done. This Objection therefore fails.



The next Objection taken is upon the late Act of Parliament *(a)*, declaring, that it shall not be lawful for any Creditor, who has, or shall have, brought any Action, or instituted any Suit, against any Bankrupt, in respect of any Demand, which arose prior to the Bankruptcy, or which might have been proved as a Debt under the Commission, to prove a Debt under such Commission for any Purpose whatever, or to have a Claim entered, without relinquishing such Action or Suit; and that the proving or so claiming a Debt shall be deemed an Election to take the Benefit of such Commission: but that cannot apply to the petitioning Creditor; who was always held to have made his Election *(b)*. Neither of these Objections therefore can be maintained.

I have been pressed by the Petitioner to put this in some Course for further Investigation by way of Appeal. I have no Way of doing that: the Legislature having thought it right to make this Jurisdiction final; and I cannot say, that it is my Duty, if I could, to put in a Course of farther Investigation a Case, upon which I have so strong an Opinion, as I have upon these Objections. The Questions upon the Trading, the Act of Bankruptcy, and the petitioning Creditor's Debt, are concluded by the Event of the Trial, that has taken place; unless upon this Consideration, the Court will not permit a Bankrupt to try repeatedly and vexatiously the Question of Bankruptcy:

(a) Stat. 49 *Geo.* 3. c. 121. s. 14.

(b) *Ex parte Wilson,* 1 *Atk.* 152. *Ex parte Ward. Ib.* 153. *Ex parte Lewes, Ib.* 154. *Ex parte Crinsoz.* 1 *Bro. C. C.* 270.

 but

1812-13.

BRYANT, *Ex parte.*

but, if he has failed in a single Action, the Court will not prevent his bringing another: neither will the Court direct another Action; but will take no Part. If the Petitioner chooses to try the Bankruptcy again in an Action, an Application must be made, when it is fit to make it, to prevent his trying that Question vexatiously: but a single Trial does not constitute that Vexation, that will authorize the Court to interfere by Injunction. All, that I can do at present, is to dismiss this Petition.

Mr. *Richards*, for the Assignees, applied for the Costs out of the Estate.

The Lord CHANCELLOR.

They must have the Costs. Whoever are concerned in effectually supporting a Commission of Bankruptcy are always considered as Persons struggling, not for their own Interest; but for the general Benefit of the Creditors; and the constant Course is to pay the Expence out of the Fund, belonging to them all.

The Bankrupt, having brought another Action, renewed his Application, that the Proceedings may be stayed, and his Offer of the Estate as a Security for the Payment of his Debts.

The Lord CHANCELLOR.

1813. *Feb.* 1.

There is no Doubt, that an Offer by the Produce of the Sale of an Estate to secure the Amount of all the Debts, proved under a Commission of Bankruptcy, has frequently received much Attention from the Court: the Object of the Commission being to satisfy the Creditors, if

1812-13. BRYANT, *Ex parte.*

if it appears, that they can be satisfied by other Means, the Court would not permit a Proceeding to go on, attended with an Expence, which under such Circumstances would be entirely thrown away: but I recollect no Instance, that upon a mere Offer to secure a Debt, without other Circumstances, the Court has stayed Proceedings; unless perfectly satisfied, that the Offer would be made good.

Considering this Case independent of that Offer, I agree, that it is unnecessary to cite Precedents to shew that Proceedings will be stayed, where the Validity of the Commission is about to be tried; and this Case in an Instance of that. I did so in another late Case (*a*) upon this Ground; that

(*a*) In *Ex parte Collins*, heard in *Lincoln's Inn Hall*, 14th *January*, 1812, the Petition by a Bankrupt, prayed, that the Commission should be superseded upon Objections to the Act of Bankruptcy, and the Trading, one of the Questions raised being, whether a Scavenger, a Person giving to a Parish a considerable Sum of Money for the Liberty of carrying away the Mud, &c. collected within the Parish, and the Dust from the Houses, was a Trader within the Bankrupt Laws? There was also an alledged Dealing in Pigs and Bricks. An Issue was accordingly directed, the Proceedings being stayed in the mean Time.

Sir *Samuel Romilly*, Mr. *Hart*, and Mr. *Montague*, for the Petitioner.—Sir *Arthur Piggott*, Mr. *Leach*, and Mr. *Cullen*, for the petitioning Creditor.

The Lord CHANCELLOR, postponed the Examination; observing, that it did not appear on the Proceedings, that the Commissioners could have had before them, what was the Nature of the Dealing: it was sworn to be by buying and selling Ashes, and Breeze: but *quo modo* did not appear upon the Depositions. There is great Difficulty in holding a Scavenger, contracting with a Parish in this Way, to be a Trader within the Act of Parliament; though he certainly

Whether a Scavenger, contracting with a Parish for valuable Consideration for Liberty to take the Mud, Dust, &c. is a Trader, within the Bankrupt Laws. *Quære.*

1812-13.
BRYANT, *Ex parte.*

that the Commissioners had adjudged the Party a Bankrupt without sufficient Authority: but upon the Allegation, that sufficient Proof would be furnished, I put them to an Issue; staying the Proceedings then before me without sufficient Proof to support them. Upon a Principle not unlike that I stayed the Proceedings in this Case: the Bankrupt insisting first, that there was no petitioning Creditor's Debt; secondly that there was no Trading; thirdly, that there was no such Act of Bankruptcy as, connected with the petitioning Creditor's Debt, if there was one, would support the Commission.

The Question as to the Trading, depending upon the Fact with what Intent he bought and sold Books and Prints, was in its Nature fit for the Cosideration of a Jury. Upon the Act of Bankruptcy it was contended, that the Fact of lying in Prison for Debt Two Months was not under the Circumstances an Act of Bankruptcy; and farther, that, if it was an Act of Bankruptcy by relation to the Commencement of the Imprisonment, the Creditor, having altered the Nature of his Debt, originally by simple Contract, or Specialty, taking a Judgment between the Time of the first Imprisonment and the Commission issued, was not at the latter Period such a Creditor as at the former; and therefore could not support the Commission; which by relation stands upon an Act of Bankruptcy, previous in Date to the Judgment.

That was a Question of Law; and attending particularly to the Trading, I directed an Action; staying the

tainly may be a Trader in the Articles of Pigs and Bricks.

An Issue was directed as to the Trading and the Act of Bankruptcy: his Lordship adding, that he was rather disposed to direct an Issue that an Action, where it appeared, that the Case insisted on was not laid before the Commissioners.

Proceedings,

1812-13.



BRYANT, *Ex parte.*

Proceedings. The Petitioner having had an Opportunity of trying the Validity of the Commission in an Action, I cannot, consistently with the Safety of Mankind, listen to a Suggestion, that as much Skill and Diligence were not applied in the Trial of that Action, as ought to have been applied. That would be attended with too much Danger to the general Interest of the Public. Upon the Trial of that Action the Opinion of the Jury under the Direction of the Judge was, that there were a good petitioning Creditor's Debt, Trading and Act of Bankruptcy; all the Essentials to making a Man liable to the Bankrupt Laws; as he may be certainly whether solvent or insolvent.

One of the Questions is a Question of Law: as to the Effect of the Change of the Security pending the Course of the Imprisonment. Suppose a Debt by simple Contract converted into a Judgment; when that is compared to a Bond taken, which goes for nothing, if there was an antecedent Act of Bankruptcy, this Distinction occurs; that the one is by Contract: the other by a Judgment *in invitum.* Whatever could be made of that, there was an Opportunity of submitting it to a Court of Law; and on a Motion for a new Trial the Court was satisfied with the Verdict; and refused to disturb it. Upon the Application to me, that followed, my Opinion was, and continues, that according to the Course in Bankruptcy, if a Commission has been sustained in an Action, directed for the Purpose of trying its Validity, it must without other Grounds be considered valid: at the same Time intimating, that, though I would not restrain the Bankrupt from again trying it, as acting in that vexatious and litigious Course, which in *Thompson's* Case (a) called for such Interposition, I would not direct the Action to be again tried without a new Ground. The Consequence would be repeated Ap-

(a) See *Chambers* v. *Thompson* 4 *Bro. C. C.* 434.

plications;

1812-13.

BRYANT, *Ex parte.*

plications; of which, if attended to, after it had once been put in a fair Course of Trial, there would be no End: but I found no Instance of restraining a Bankrupt from again trying the Validity of the Commission on the Ground that it had been once tried.

Whether I should stay the Proceedings, because the Bankrupt might bring another Action, or would direct another Action, and stay the Proceedings, are very different Questions. In such Cases Proceedings are never stayed except upon extremely special Grounds, different from those, on which the first Action was directed; and which could not be taken into Consideration upon the Trial of that Action. I know no Instance, except the Case of *Parker (a)* the Brickmaker; in which there was a special Verdict. It does not appear to me, that I have before me any Ground for staying all the Proceedings under this Commission merely because the Bankrupt has brought a second Action.

As to the Offer, made by the Bankrupt of a particular Estate for Sale, I will not dispose of that without reading the Proceedings; with a View to ascertain the Value of that Offer; which I cannot at present estimate.

1813, *Feb.* 3.

The Lord CHANCELLOR said, that upon reading the Proceedings nothing appeared to shew, that this Estate can be brought to Sale so as that this can be considered an Offer of Property immediately available to the Creditors; and directed, that the Examination of the Bankrupt should proceed to the Extent of ascertaining his Title to that

(a) *Ex parte Harrison*, and *Parker* v. *Wells*, 1 *Bro. C. C.* 173. 1 Term Rep. 32. 1 *Cook's* Bank. Law, 47. Ed. 6, by Mr. *Gregg*.

Property;

Property; confining it to that; and the Petition should stand over for the Result of the Trial; observing, that he made that Order on the Supposition, that, if the Commission should be sustained, and by the Time the Action was over it should appear, that a Part of the Estate would pay all the Debts, he should act upon a Principle frequently recognized by superseding the Commission; taking Care, that all the Creditors are paid.

1812-13.

BRYANT, *Ex parte*.

BERKS *v.* WIGAN.

1813. *Feb.* 10.

Order to withdraw Rejoinder, and rejoin *de novo*; for the Purpose of giving Notice of Intention to dispute an Act of Bankruptcy, under the Stat. 49 *Geo.* 3. c. 121: by analogy to the Practice at Law to permit a Plea to be withdrawn; requiring, according to the Practice in the *Exchequer*, the Affidavit to state the Deponent's Information and Belief, that it is essential to the Justice of the Case.

THE Answer in this Cause disputed an Act of Bankruptcy. The Defendant's Solicitor, conceiving, that the late Act of Parliament *(a)*, did not require a Notice in Writing of an Intention to dispute the Act of Bankruptcy, where the Commission had, as in this Instance, issued before that Statute, omitted to give such Notice. The Defendant moved, that he might be at Liberty to withdraw his Rejoinder, and rejoin forthwith *de novo*; wishing to be placed in a Situation to dispute the Act of Bankruptcy.

Mr. *Hart*, and Mr. *Parker*, for the Motion, submitted, that this was a mere Slip in Practice; that on similar Applications to the Courts of *King's Bench* and *Exchequer* Orders had been made, as of course, allowing Pleas to be withdrawn for the Purpose of the Defendant's being let in to

(a) Stat. 49 *Geo.* 3. c. 121.

1813.

BERKS
v.
WIGAN.

to dispute the Act of Bankruptcy; referring to *Willcock* v. *Smith (a)* and *Radmore* v. *Gould (b)*.

Sir *Samuel Romilly* resisted the Motion on the Ground, that the Bankruptcy had repeatedly been tried both at Law and in Attempts to supersede the Commission: but every Attempt to impeach this Commission had failed; and therefore some special Circumstances ought to be stated to induce the Court to grant this Indulgence

The Lord CHANCELLOR.

It is the Practice of the Court of *King's Bench*, if the Justice of the Case requires it, to withdraw the Plea, and file a new one, giving Notice; and the Court of *Exchequer* followed that; requiring this additional Allegation in the Affidavit; that the Deponent is informed and believes, that it is essential to the Justice of the Case, that the Defendant shall be at Liberty so to object.

The Order was pronounced accordingly with that Allegation.

(a) 2 *Campb. p.* 184. See also *Clarkson* v. *Dadds*, in the Note.

(b) 1 *Wightw. Exch.* Ca. p. 80.

MONDEY

MONDEY *v.* MONDEY.

1813, *Feb.* 11.

Inquiry directed, in case the Mortgagees consent to a Sale, whether it will be for the Benefit of the infant Heir of the Mortgagor.

THE Plaintiff, as Mortgagee, filed her Bill against the infant Heir of the Mortgagor, and other Persons, claiming to be first Mortgagees. The Bill prayed, that the Plaintiff may redeem the Mortgagees, if prior; and that the Heir may then redeem the whole; or that the Defendant Mortgagees, if subsequent, may redeem the Plaintiff; or that all the Defendants may be foreclosed: or that the mortgaged Property may be sold, all proper Parties concurring, and the Money to arise by the Sale be applied in Payment of the Money due to the Plaintiff and the Mortgagees Defendants in respect of their Securities according to the Priorities of such Securities; and that the Surplus, if any, produced by the Sale, may be secured for the Benefit of the Defendant, the infant Heir of the Mortgagor.

Mr. *Hart*, and Mr. *Dowdeswell*, for the Plaintiff, prayed a Sale; observing, that though they could not produce an Instance, this might perhaps be done; as the Court had in many Respects extended its Jurisdiction for the Benefit of Infants.

Mr. *Utterson*, for the infant Heir. Mr. *Collinson*, for the other Mortgagees.

The Lord CHANCELLOR.

It would be too much to let an Infant be foreclosed; when, if the Mortgagee will consent to a Sale, a Surplus may be got, of perhaps £4000, considered as real Estate, for the Benefit of the Infant. If there was no Precedent,

1813. Mondey. v. Mondey.

cedent, I would make One, but I am sure, this has been done.

The Decree directed a Reference to the Master to take an Account of the Monies, due to the several Incumbrancers; and to ascertain and report their several Priorities; with the usual Directions for the subsequent Incumbrancers to redeem the prior in the usual Course; and, in case the Mortgagees shall consent to a Sale, that the Master shall inquire, and report, whether it will be for the Benefit of the Infant, that the Estate should be sold; and farther Directions and Costs were reserved.

1813, *Feb.* 10.

BALMANNO v. LUMLEY.

Reference of Title before Answer: Plaintiff, the Vendor undertaking to to do all such Acts for the Purpose of executing what the Court thinks right as if the Answer was in, and the Cause brought to Hearing.

Direction, if the Report shall be against the Title, for Compensation; refused as to Indemnity.

THE Bill prayed the specific Performance of a Contract for the Purchase of an Estate.

Mr. *Hart*, for the Plaintiff, the Vendor, moved for a Reference of the Title.

Mr. *Cooke*, for the Defendant, the Purchaser, objected, that this is never done before Answer; and such Practice would be inconvenient; the Answer stating the Grounds of Objection to the Title.

Mr. *Hart*, in Reply, said, that the Bill was a mere Averment of the Contract; putting no special Fact

in

in Issue: therefore there was no Use in waiting for the Answer.

1813.
BALMANNO
v
LUMLEY.

The Lord CHANCELLOR.

One Difficulty, stated by Mr. *Cooke* is, how the Court is to proceed afterwards; but on such a Motion the Court considers the Plaintiff as undertaking to do all such Acts for the Purpose of executing what the Court thinks right, as if the Answer was in, and the Cause brought to Hearing. With that Undertaking, if they cannot state any Objection to the Performance, and the Reference is merely to look into the Title, I do not apprehend the Answer to be necessary before that Reference.

Let the Order go therefore, with that Undertaking (*a*).

Mr. *Cooke* desired to add to the Order a Direction, in case the Report should be against the Title, for Compensastion and Indemnity; suggesting, that as to Part of the Estate Indemnity might be more convenient than Compensation.

Mr. *Hart*, agreed to the Inquiry as to Compensation; but objected as to an Indemnity; which might prove inconvenient to Families; insisting, that the Purchaser must either take the Title with an Allowance for a Defect, or reject it.

The Lord CHANCELLOR said, he did not apprehend, the Court could compel the Purchaser to take an Indemnity, or the Vendor to give it; and accordingly confined the Order to Compensation.

(*a*) *P..ton* v. *Rogers*, *post*.

1813.

Lincoln's Inn Hall. *Jan.* 12, 13, 14, 20.

THE MAYOR AND COMMONALTY OF COLCHESTER *v.* LOWTEN.

General Right of Corporations, of whatever Nature, at Law to alienate their Lands, held in Fee, subject as to Ecclesiastical Corporations to the restraining Statutes; and no Instance of a Trust attached upon the Ground of Misapplication, as not to Corporate Purposes, except the Case of Corporations, holding to Charitable Uses.

Whether such a Jurisdiction prevails in other Cases, upon an Application to Purposes clearly not Corporate, *Quære.* A Bill on that Ground impeaching Securities as obtained under an abuse of Trust by the select Body of the Corporation of *Colchester*, using the Common Seal for raising Money to defray the Expences of Actions againt the Mayor and Town Clerk, relative to Elections of the Recorder and a Representative of the Borough in Parliament, dismissed upon various subsequent Transactions, especially an Award, binding the Corporation at large through the select Body, acting with Authority, and upon a fair Question, whether the Purpose was Corporate, or not. Costs upon a groundless Imputation of Fraud.

THE Object of this Bill was, that Indentures of Lease and Release, dated the 26th and 27th of *July*, 1791, being a Mortgage for £2000 and Interest, a Bond, of the same Date, as a collateral Security, and another Indenture, dated the 28th of *January*, 1804, alledged to have been executed under the Corporate Seal of *Colchester*, might be declared void, and delivered up to be cancelled or declared to stand only as a Security for such sums as were *bona fide* advanced by the Defendant for the Use of the Plaintiffs; and an Injunction.

The Bill impeached the Securities of the 26th and 27th of *July*, 1791, as unjustly obtained; and without any good or legal Consideration; alledging, that by the Custom or Usage of the Borough none of the Lands, &c. vested in the Mayor and Commonalty, can be sold or mortgaged without the Consent of the Mayor and Commonalty in Common Hall assembled or the major Part of them; a Custom invariably adhered to since the Char-

ter of Incorporation in 1763, except in the Instance of these Securities; to which, contrary to such Custom, the Common Seal was affixed by the Contrivance of *Francis Smythies*, then Town Clerk of the Borough, whose Agent the Defendant was, in a clandestine Manner, without the Assent of the Mayor and Commonalty in Common Hall assembled.

The Bill farther alledged, that of the Sum of £2000, stated in the Indenture of 27th of *July*, 1791, to be advanced and paid by the Defendant to the Chamberlain for the Use of the Corporation, no Part was advanced; but the real Consideration was a Bill of Costs to that Amount in defending, as Agent of *Smythies*, a *Quo Warranto* Information, filed against him in 1788 for exercising the Office of Recorder of the Borough, and other Suits and Prosecutions, originating in Election and Party Purposes, and not connected with the Rights and Interests of the Corporation.

To this Bill the Defendant put in a Plea and Answer; pleading the Indentures and Bond of the 26th and 27th *July*, 1791: a Reference and Award in 1801 between the Plaintiffs and Defendant concerning the Principal and Interest, secured by those Securities, that the Plaintiffs should pay the Defendant £2266 15*s*. and a Deed, dated the 28th of *January*, 1804, confirming the Mortgage of 1791; and by way of Answer stating, that all the Circumstances, under which the Mortgage was obtained, and the true Consideration thereof, were laid before the Arbitrators.

The Plea was disallowed by the *Lord Chancellor* as covering too much in covering the last Instrument.

The Defendant then put in his Answer; from which it appeared, that he had lately filed a Bill against the

1813.

The MAYOR and COMMONALTY of COLCHESTER v. LOWTEN.

Plaintiffs for a Foreclosure. He denied the Custom, as stated by the Plaintiffs; alledging, that the select Body of the Corporation, consisting of the Mayor, Aldermen, Assistants and Common Council, which Common Council consisting of Eighteen were elected by and out of the Commonalty at large, who were upwards of One Thousand Three Hundred, have full Power to sell or mortgage the Corporation Lands without the Consent of the Commonalty at large, in Common Hall assembled. He denied, that the Common Seal was affixed to his Mortgage contrary to the Usage by the Contrivance of *Smythies* in a clandestine or improper Manner; admitting, that it was affixed without the Consent of the Mayor and Commonalty, in Common Hall assembled, or the major Part of them; which he insisted was not necessary. He admitted, that the £2000 was not advanced to the Chamberlain for the Use of the Corporation; but arose in the following Manner:—In 1787 upon an Election for the Office of Recorder *Smythies* was returned as duly elected. In consequence of the Warmth, occasioned by this Contest, many Actions were brought against *Edward Capstack*, the Mayor, for refusing Votes, tendered for Mr. *Grimwood*, the unsuccessful Candidate; who applied to the Court of *King's Bench* for Leave to file an Information in the Nature of a *Quo Warranto* against *Smythies*; which was terminated by a Compromise: Mr. *Grimwood* being sworn into the Office of Recorder, and *Smythies* being appointed Town Clerk. In 1788 upon the Election of a Representative of the Borough in Parliament Mr. *Tierney* and Mr. *Jackson* being the Candidates, *Bezaliel Angier*, the Mayor, made a special Return, that the Numbers on the Poll were equal; and Mr. *Tierney* commenced an Action against him for a false Return.

On

On the 20th of *July*, 1789, at a Meeting of the select Body of the Corporation, consisting of the Mayor, Aldermen, Assistants, and Common Council, an Order was made; reciting, that such Actions had been commenced, and the Opinion of the Assembly, that *Capstack* and *Angier* had executed the Office of Mayor faithfully and honestly; and therefore resolving, that they should be protected, defended, and indemnified, by the Corporation by and out of the Revenues thereof against such Suits; and, for better carrying that Order into Effect, that the Mayor for the Time being together with any Two of the Aldermen, any Two of the Assistants, and any Two of the Common Council, be a Committee for the Purpose of borrowing a Sum, not exceeding £2000, for answering the above End; such Committee being authorized to raise the £2000 by Mortgage of the Estates of the Corporation; and to affix the Common Seal to all Deeds, necessary for effecting such Purpose. On the 18th of *December*, 1789, at another Meeting of the select Body it was ordered, that they should make such Return to the *Mandamus*, requiring them to swear Mr. *Grimwood* into the Office of Recorder, as Counsel should advise; in order that the Election might be tried; that it should be tried at the Expence of the Corporation; that the Mayor should be indemnified by the Corporation; that the Defendant should be employed to conduct this Business; and that the Costs of defending the *Quo Warranto* Cause against *Smythies* should be borne by the Corporation.

The Answer farther stated, that in prosecuting and defending these Causes, £2156 : 6*s.* : 11*d.* became due to the Defendant; of which Sum £1400 was Money out of Pocket; and his Bill of Costs on that Account was the Consideration for his Mortgage; which he insisted came within the Spirit of the preceding Orders.

1813.

The Mayor and Commonalty of Colchester v. Lowten.

The Interest was regularly remitted to the Defendant by *Smythies* during his Life; but since his Death in 1798 no Interest having been paid, the Defendant applied for his Money, and the Plaintiffs disputing the Bills, a long Correspondence ensued; which terminated in an Agreement for a Reference of the Defendant's Claims, dated the 22d of *April*, 1801, signed and sealed by the Defendant; and sealed on the Part of the Plaintiffs with the Common Seal; which was affixed by the Direction of the select Body.

The Defendant insisted, that all the Objections to his Security, as stated in the Bill, were laid before the Arbitrators in a Case, drawn up by the Town Clerk on behalf of the Corporation; and by the Award, dated the 24th of *December*, 1801, the Sum of £2266 : 15*s*. was found to be due from the Plaintiffs to the Defendant. That Sum not being paid, the Defendant in *Trinity* Term, 1803, filed a Bill for Redemption against a prior Mortgagee and Foreclosure against the Corporation; but consented to stay Proceedings in that Suit for Two Years on receiving the Interest then due, and an Agreement, that such Delay should not prejudice the Suit, and that the future Interest should be increased from £4 : 10*s*. to Five *per Cent*.

In pursuance of that Agreement by an Indenture, dated the 28th of *January*, 1804, indorsed on the original Mortgage, the Mayor and Commonalty in Consideration of the Sum of £2266 : 15*s*. which they acknowledged to be due from them to the Defendant, granted and confirmed to him all the Premises, comprised in his original Mortgage, to secure the principal Sum of £2266 : 15*s*. and Interest at Five *per Cent*.; covenanting to pay the Interest Half-yearly, and the Principal in *January*, 1806. The Interest not being paid, the Defendant commenced an Action upon his Bond; and obtained a Verdict.

The

The Answer insisted, that the Debt so owing to the Defendant for his Bill of Costs, was a legal and sufficient Consideration for the Bond and Mortgage; that such Bond and Mortgate were valid and binding on the Corporation notwithstanding the Objection as to the Mode of affixing the Corporate Seal; that, if the original Securities were questionable, they had been since repeatedly confirmed by the Award, the Deed of 1804, the subsequent Payment of Interest, and the Orders and Admissions of the select Body; all which Acts took place with the Concurrence of the Recorder, the proper Law-Officer of the Corporation; and were Corporate Acts, binding the Corporation.

On the 12th of *March*, 1811, the *Lord Chancellor* directed Four Issues, to be tried in the Court of *Exchequer:* Whether the Common Seal of the Mayor and Commonalty was duly and lawfully affixed to the Indenture, dated the 26th and 27th *July*, 1791; the Bond, dated the 27th of *July*, 1791, the Agreement, dated the 22d of *April*, 1801, and the Indenture, dated the 28th of *January*, 1804, or to any or either of those Instruments.

Upon the Trial of those Issues the Jury found, that the Common Seal of the Mayor and Commonalty was duly and lawfully affixed to the said several Indentures, Bond, and Agreement.

The Cause was heard for farther Directions.

Sir *Samuel Romilly*, Mr. *Hart*, and Mr. *Roupell*, for the Plaintiffs.

All Corporations are Trustees for the Individuals, of which they are composed; and in that Character are

1813.

The MAYOR and COMMONALTY of COLCHESTER v LOWTEN.

bound to consult the Interest of their Members. If those who act on behalf of the Corporation, cannot apply the Funds of the Body to their own individual Advantage, neither can they appropriate those Funds to gratify their Passions, or to serve the Purposes of their own particular Party. In the View of a Court of Equity such Objects must receive equal Censure. It is not very probable, that Cases in Point can be produced: Corporations generally contriving to veil their Abuses from the Observation of Justice. Yet, if Authority is required, the Case of *The King* v. *Watson (a)*, furnishes a clear Opinion of *Ashhurst*, Justice, in Favor of this Jurisdiction: a Judge, perfectly conversant with the Doctrines of this Court; having sat only Five Years before as one of the Lords Commissioners of the Great Seal. This cannot be represented as a Bill, filed by a Corporation to defeat their own Acts. The Transactions complained of are Acts, not of the Corporation, but of the select Body; affixing the Common Seal to Instruments, which, though good at Law, may be the proper Subject of Relief in Equity; as Relief would be given against a Party, claiming with Notice under a fraudulent Execution of a legal Power of Attorney to execute a Deed.

The Defendant knew, that the Mortgage was granted for Purposes, in which the Corporation had no Interest; and, that the Mortgage, if in the strict legal Sense valid, amounted to a Breach of Trust. He admits, that the Consideration was, not Money advanced, but a Debt. Here the Question arises, whether that was a Debt, which the Corporation ought to have paid. The Charge respecting the Contest for the Recordership, and the Actions resulting from the Mayor's Return at the Election, constitute a very large Part of this Debt. The

(a) 2 Term Rep. 199. See Page 204.

Contest

Contest for the Recordership was one purely individual; affecting the Two Candidates only, and with which the Corporation had really no Concern. It would have been widely different, had a Person, not elected by the Majority, been forced upon the Corporate Body. Resisting such an Attempt they would have been asserting their own Rights: but this is the Act of a Minority, having accidentally the Seal in their Power, and availing themselves of it to oppose what was in Truth the Election of the Majority. The Act of the select Body was a Nullity; unless the Corporation by their Acquiescence confirmed it with respect to third Persons.

Allowing, that the Corporation at large possessed the Power to dispose of the Funds, belonging to their Body, that could give no such Right to a Minority so to act at the Expence of the whole Corporation. Suppose the Treasurer, in Possession of a Fund, proposed to apply it to the Payment of such a Bill as this: could not the Corporation at large, or the Majority, obtain an Injunction to restrain him from paying and the other Party from receiving it? The same reasoning applies to the Actions brought against the Mayor. They were purely personal to him; and the Corporation had not the Power of applying the Funds to cover the Expences of those Actions; which was a clear Misapplication; and the Defendant in his Character of Solicitor and Agent to the Town Clerk could not be ignorant of it. By the express Terms of the Charter the Funds of the Corporate Body are to be applied only to public Purposes; and by what Course of reasoning can these Objects be so described?

In *Adley* v. *The Whitstable Company* (a) your Lordship, putting the Case of a By-law, made for the per-

(a) 17 *Ves.* 315. See Pages 320, 322.

sonal

1813. The Mayor and Commonalty of Colchester v. Lowten.

sonal Benefit of the Individuals making it, excluding the other Members from a Participation in the Profits, to which all were entitled, declared your Opinion in Favor of the Jurisdiction of this Court to controul such an Exercise of even a legal Right; and how much stronger is the Case here presented: this unauthorized Attempt of the Minority to dictate to the Majority; to act for the whole Body, and dispose of the Funds by an arbitary Discretion, independent of all Controul. The Defendant's Security must be set aside as granted without Consideration. He admits Notice, that the Seal was affixed without the Consent of the Mayor and Commonalty at large; and that the Money was not advanced, as falsely recited in the Instruments. The Acts, represented as a Confirmation, all stand in the same Predicament as the original Security; being Acts done by the select Body, equally unauthorized.

If this Mortgage can stand, there is no Purpose, however corrupt, to which the Funds of a Corporation may not be applied. Conceding for the Argument that the select Body had the legal Power to affix the Seal, yet under the Circumstances, with the Defendant's Knowledge, that the Purpose was corrupt, and not Corporate, his Security cannot be allowed to prevail.

Sir *Arthur Piggott*, Mr. *Richards*, Mr. *Wetherell*, and Mr. *Horne*, for the Defendant.

The Argument in support of this Bill opens to the Court a most extended Jurisdiction. The Plaintiffs, abandoning their original Position, that the Deeds were illegal, now call for the Interference of this Court to have them removed, as Clouds upon their Title.

The

The Corporation is the sole Plaintiff: no individual Members impeaching the Conduct of the select Body. In that respect this Case is distinguished from *Adley* v. *The Whitstable Company*; where the Plaintiff asserted that, having performed his Duty by dredging the Oysters, he was under the By-law excluded from a Share of the Profits; and your Lordship directed an Action to try the Validity of that By-law; which was the whole Jurisdiction exercised in that Case. The Security, given by the select Body, is the Security of the Corporation. The Power of making Laws, binding this Corporation, is in the select Body. That has been repeatedly established, by the Court of *King's Bench* in the Action upon the Bond, and by the Court of *Exchequer* in the Trial of the Issues directed. This Power appears to have been vested in the select Body from Time immemorial; being derived to them by Prescription, not by Charter; and innumerable are the Instances, in which the select Body has mortgaged the Property of the Corporation, and exercised other Acts of Government, without the Interference of the Burgesses. The equitable Object of this Bill is to set aside Instruments of the Plaintiffs themselves, decided to be legal Instruments; and the Principle, on which that is maintained, is, that the Corporation are Trustees: the Bill not alledging any Trust; but stating a general Proposition, that will entitle every Corporation in the Kingdom by merely filing a Bill, stating no more than that some Act not Corporate has been done, to set aside their deliberate Acts, defeat their Engagements, and evade their Debts. It is admitted, that there is no Instance of such a Suit.

The Plaintiffs cannot maintain, that the Corporation had no Interest in the Appointment of the Recorder, their Law Adviser; and if the Mayor is to stand the Consequences

1813.

The Mayor and Commonalty of Colchester v Lowten.

sequences of every Action, brought against him in that Character, he may be overwhelmed. The Proceedings against these Officers were against them, not as individuals, but in their official Characters; and why, may not the Corporation defend any Member, attacked in his Corporate Character, for Acts, done in the Execution of his Office? Could this Defendant know, whether the Purposes, for which the Money was employed, were Corporate or not; and is he at this Distance of Time, when all the Individuals, against whom he might have proceeded, are dead, to lose the Security, upon which he was induced to rely? At least he must be entitled to the common Justice, which a Court of Equity administers; where Relief is sought. The usual Practice of the Court is, when any one comes here to set aside a Deed fraudulent or illegal, as being usurious to impose this Term upon the Plaintiff, that he shall repay the Money actually disbursed.

Whatever were the original Circumstances, here are the strongest Acts of Confirmation: Payment of Interest to the Year 1797: the Agreement to refer; by which they chose the Forum; and the Deed of 1804. In all Cases a Party, having a Right to extricate himself, if, aware of the Objection, he confirms the original Act, cannot afterwards avail himself of that Objection. Whence do these Plaintiffs derive the Privilege of laying by for so many Years? The only Authority referred to is an Opinion accidentally dropped by a single Judge, sitting in a Court of Law. Can such an Opinion be received as conclusive Evidence of the Doctrine of this Court upon a Subject peculiarly its own?

Supposing, that this Money was not raised for Corporate Purposes, that this is therefore to be considered as a Misapplication,

1813.

The MAYOR and COMMONALTY of COLCHESTER *v.* LOWTEN.

a Misapplication, the Question would arise, whether this Court could shortly after the Mortgage have restrained the Defendant in the Exercise of his legal Rights, as Mortgagee; or have directed the Instrument to be cancelled. That is certainly a Question of great Novelty, and no less Importance; involving another Question, the Competency, or Incompetency of Corporations to dispose of their Property. From Time immemorial we find it laid down by all the Courts of Law, that Grants by Corporations of their Estates, whether for Corporate Purposes, or not, were good (*a*). Lord *Coke*, indeed, does not hesitate to lay down, that any Corporation, ecclesiastical or civil, might alienate, and that without the Patron or Founder.

Independent of the restraining Statutes of *Elizabeth* (*b*) Corporations could dispose of the whole of their Estates; having the absolute and unqualified *jus disponendi*; neither limited as to the Objects, nor circumscribed as to the Quantity; and the Proposition of the Plaintiffs is, that this unqualified Power which Corporations possess at Law, may be cut down in this Court. So incidental to a Corporation, lay or ecclesiastical, is this Power of free Alienation, that the Crown cannot constitute a Corporation without it; according to the celebrated Case of *Sutton's Hospital* (*c*): so that, if a Corporation should be constituted, to alien with the Consent of the *Lord Chancellor* of *England*, the Qualification would be void. The *Dictum* of Mr. Justice *Ashhurst* is opposed by the Opinion of Mr. Justice *Blackstone*, that the visitatorial Power of the Crown over Civil Corporations is exercised in the

(*a*) *Co. Litt.* 44, *a.* 300, *b.* *Siderfin*, 162. *Smith* v. *Barret*, 3 *Comyn's* Dig. Tit. *Franchise*, f. 11. 18.

(*b*) 1 *Eliz.* c. 19. 13 *Eliz.* c. 10. 14 *Eliz.* c. 11 & 14. 18 *Eliz.* c. 11, and 43 *Eliz.* c. 29.

(*c*) 10 *Co.* 1. See 306.

Court

1813.
The Mayor and Commonalty of Colchester v Lowten

Court of *King's Bench (a)*, and there only. In the *Banker's Case (b)* the Opinion of *Holt*, C. J. is at Variance with that of Justice *Ashhurst*. The Silence of all the Authorities is conclusive, that there is no visitatorial Power in a Court of Equity. It is singular, if a Corporation, taking liable to a Trust, cannot alienate, that it should have escaped Lord *Somers*; who heard the *Banker's Case*. The Rusult of all the Authorities is, that the Alienation of a Corporation is as binding in Equity as at Law. The Statute of Charitable Uses (*c*), which has been supposed to create the Jurisdiction of this Court, contains nothing, which supports it; nor, is there in *Duke's* Book *(d)* an Instance of a Commission to enquire after Estates, alienated by Corporations; a strong Argument, that this Court has no visitatorial Power.

It is not judicially apparent, however, that the Corporation committed any Breach of Trust in supporting the Mayor or Recorder; nor whether such were or were not Corporate Purposes, and the Jurisdiction of this Court can only be exercised, when that is ascertained. The Proposition of the Plaintiffs admits, that a Corporation may mortgage, or alienate, for Corporate Purposes: but the Jurisdiction, if it depends upon the Nature of the Purpose, as not being Corporate, must attach upon any Corporate Expenditure; as building Bridges, &c.: a

(*a*) 1 *Comm.* 480, 481. This Opinion is controverted by Mr. *Christian*; who distinguishes the Power of the Court of *King's Bench* upon Complaint to prevent and punish Injustice in Civil Corporations from visitatorial Power; as not only liable to Reversal by Writ of Error, but also wanting an essential Ingredient, the Discretion voluntarily to regulate and superintend.

(*b*) *Skinn.* Rep. 602.

(*c*) 43 *Eliz.* c. 4.

(*d*) The Law of Charitable Uses.

Doctrine,

Doctrine, which goes to the utter Extinction of the Principle, on which all Corporations are founded; and gives this Court an equal Power over Civil Corporations as it exercises over Charitable Uses, in Opposition to the Principle, that in all Corporations there is somewhere vested an absolute, uncontroulable, Power and Discretion, without Appeal. It will scarcely be contended, that the Corporation could not submit to Arbitration. That Right they clearly have under the *Statute of William (a)*; even if at the Trial in the Court of *Exchequer* many Instances of the select Body submitting by their Seal to Arbitration, and even borrowing Money to defend Law Suits, had not been produced. Supposing the original Security invalid, what is there to impeach the Award, or invalidate the Debt there by created? Conceding for the Sake of Argument, that the Jurisdiction exists, may not a Corporation by Confirmation or Waiver be precluded from the Right of resorting to it?

Sir *Samuel Romilly*, in Reply.

In this Cause, certainly of very great Importance, involving Points of considerable Weight, the Defence brings forward Four Questions: first, whether this Court has Jurisdiction: secondly, whether this Money was applied for Corporate Purposes: thirdly, whether the Acts, relied on as a Confirmation, preclude the Relief: and fourthly, whether any Relief can be given against the Defendant, as a Stranger, and a Purchaser for valuable Consideration. With respect to the first Point the Defendant contends, that this Court has no Jurisdiction for a direct Breach of Trust; a corrupt Misapplication of the Funds of this Corporation. The Absence of Authority can never be conclusive against the clear and obvious Principles, on which

(a) 9 & 10 *W*. 3. c. 15.

this

1813.
The Mayor and Commonalty of Colchester v Lowten.

this Jurisdiction stands. Admitting, that a Corporation has by Law the Power of Alienation, that the Crown cannot constitute a Corporation without that Power, as incident to their Fee, no Authority upon that Head proves, that Courts of Equity have no Jurisdiction, let the Application of the Corporate Property be what it may; and the numerous Decisions, correcting Breaches of Trust are Authorities in support of it. If, where the visitatorial Power exists, this Jurisdiction is excluded, the Presumption is, that it attaches, where there is no such Power. The Jurisdiction cannot be derived from the Act of *Elizabeth (a)*; which directs the Appointment of Commissioners. The select Body is established by the Decision at Law to be Trustees, mere ministerial Agents of the Corporation; and as such bound to exercise their Powers for the Benefit of the whole Body. The Objects of Incorporation are to preserve Peace, to administer Justice, &c. in order to promote the general good, not of the Corporation alone, but of the Kingdom at large: His Majesty granting these Corporate Privileges as a Trustee for the whole public Weal. The Consequence is, that the select Body can act only for the general good.

Suppose, the restraining Statute of *Elizabeth* had never passed, and that a Bishop had in the present Day made a beneficial Grant to one of his Family, can a Doubt be suggested, whether this Court would have interfered? Considerable Weight, is to be attached to the Opinion of Mr. Justice *Ashhurst*; who speaks of this as a general Principle, merely necessay to be stated, in order to be admitted, and not requiring any Authority to confirm it.

The Distinction between charitable and public Trusts is so nice and refined, that it can scarcely be followed.

(a) Stat. 43 *Eliz.* c. 4.

It

It is sufficient, that this is a Corporation for public Purposes. The Issues having decided these Instruments to be good at Law, the Plaintiffs are now entitled to a Relief, different from that originally prayed, that the legal Estate may be re-conveyed.

The Question, whether the Money was raised for Corporate Purposes, depends upon the Interest, which the Corporation had in the Dispute concerning the Election of a Recorder, and the Actions against the Mayor. The Election of Recorder is in all the Burgesses; and the Corporation at large had an Interest to have the Person returned, who was duly elected; but had no farther Interest in the Success of either Candidate. How then can it be maintained, that this Act of the select Body, including the Mayor, who ought to have been impartial, supported by the Prejudices of one Part of the Corporation against the other, was a proper Application of the Funds to Corporate Purposes? If such an Application of them can be sustained, why not for a similar Purpose previous to an Election: for Instance, to defray the travelling Expences of Electors, coming to vote for the Candidate, favored by the select Body, to represent the Borough in Parliament?

The Acts, set up as a Confirmation, are no more than the Acts of the select Body, corroborating the Acts of the select Body: not the Acts of the Corporation at large; who alone were capable of confirming these Securities. The Confirmation of the select Body, unless they can be considered as the Corporation, is as unavailing as the Confirmation of a Deed, impeached for Intoxication, by an Act of the Party, while in the same State; tainted by the Vice of the original Transaction. The Right of any individual Member to complain is not inconsistent with a

1813. The Mayor and Commonalty of Colchester v. Lowten.

similar Right in the whole Corporation. The Bankers' Case affords no Authority against the Jurisdiction in such a Case as this; the Application by this select Body of the Funds of the Corporation to Purposes, adverse to their general Interests: an Abuse of Trust: a Breach of Faith and Public Duty, that must go unredressed, a signal Instance of a compleat Failure of Justice, unless this Court applies the Remedy.

Jan. 20.

The Lord CHANCELLOR,

Stating the Circumstances particularly, pronounced the following Judgment.

I have no Recollection of any Case of this kind except one: a Suit, instituted in this Court upon a Bill by some of the Corporation of *Alnwick* against the Body, the acting Part of that Corporation, very much of this Nature: but I do not know what became of it.

The Bill in this Cause contends, that all or Part of the Expenditure, which is the Subject of this Suit, was not for Corporate Purposes; and, if not, that it was not competent to the select Body to charge the Corporation with an Expenditure, not for Corporate Purposes; that the Property of the Corporation is held by them in Trust for Corporate Purposes; and therefore the select Body, if they have the Capacity of acting, could not pledge the Property of the Corporation for Purposes, not corporate, at least not without the Assent of the Body at large; and upon that Hypothesis they might go farther; and contend, that the Body itself could not pledge the Property for Purposes not corporate.

In answer to the Claim of Relief on that Ground it is said,

1 13.

The MAYOR and COMMONALTY of COLCHESTER v LOWTEN.

said there are a great Variety of subsequent Transactions; and, if ever there was a Case, in which subsequent Dealings could set right what was originally wrong, if this can be so characterized, this is that Case: this Defendant having been, either with or without the Assent and Knowledge of the Body at large, dealing with the select Body, with a View to an amicable Settlement, by a vast Number of Transactions, through a vast Series of Years, in every Way possible; and, if in that Object he has failed, as there is not the slightest Pretence upon this Record for saying, that he has ever dealt dishonorably, though gross Fraud is very blameably imputed to him, he has a fair Claim to urge, that, if the subsequent Transactions are unavailing, he sustains considerable Hardship in losing all the Remedies for his Advances, Labor and Time, to which he would have been entitled; as, if he cannot establish his Demand against the Corporation, with regard to a great Proportion of it he might have established it against *Smythies*; and if the select Body pledged to him the Funds of the Corporation for Purposes, to which they could not be applied, they would themselves have been personally answerable to him. All that however is gone by.

It is now insisted upon the subsequent Transactions, that, as they passed between the select Body and *Lowten*, they cannot have the Effect he contends for. When this Cause came originally before me, the first Question appeared to be, what was the Species of Relief to be given, if any Relief was due to the Plaintiffs; and it was then contended for the Corporation, that, notwithstanding what passed at the Trial of the Action upon the Bond, as to the Use of the Corporation Seal, the Mortgage, the Bond, and the Deed, as it is called, of Confirmation, and the Submission to Award, are all good for nothing: a Use having been made of the Corporate Seal, authorizing the Plain-

 tiffs

1813. The Mayor and Commonalty of Colchester v. Lowten.

Jurisdiction of a Court of Equity to order a void Deed to be delivered up.

tiffs to say, that these are not Corporate Instruments; and if that Allegation can be made out, there is a clear Title to Relief: my Opinion having always been, differing from others, that a Court of Equity has the Jurisdiction and Duty to order a void Deed to be delivered up, and placed with those, whose Property may be affected by it, if it remains in other Hands.

Issues were therefore directed; and all these Instruments were found to be Instruments, amounting to valid Alienations of Corporate Property: in other Words it was found, that the Seal was legally and duly affixed to them: I say "duly;" having either suggested, or acceded to the Suggestion, that this Word should be inserted; that it should be open to the Parties to try, whether any Thing could be made of it.

The Relief, now to be asked, must therefore be upon quite a different Principle; and though all the Authorities upon what is not often the Subject of Consideration here, have been most usefully brought forward, I have no Doubt, that, independent of positive Law, as to the legal Powers of a Corporation, Corporations, Civil, Ecclesiastical, or of whatsoever Nature, could in Point of Law alienate Lands, of which they were seised in Fee; and the History of what Corporations, both aggregate and sole, did before the restraining Statutes is very useful. Civil Corporations are at this Day in the constant Habit of making these Alienations: their Title to make which is asserted by Lord *Coke*. In the Course of my Experience in this Court, of my present Researches, and of my Examination of Authorities, which, having had Occasion to consider them formerly, this Cause has brought back to my Recollection, nothing has occurred, shewing, that there ever was a Case, in which this Court attached the Doctrine of Trust, as applied under the Words, "Corporate "Purposes"

1813.

The Mayor and Commonalty of Colchester *v.* Lowten.

"Purposes" to the Alienation of a Civil, or indeed of an Ecclesiastical, Corporation. With regard to what was stated by Sir *William Ashhurst*, a very respectable Judge, and who, I take this Opportunity of saying, was a very useful Judge as a Commissioner in this Court, I do not lay down, either that this is the Subject of Jurisdiction here, as Trust, or of Information in the Court of *King's Bench*. The Opinion, that this Court has Jurisdiction, is to be considered as the Opinion, not only of Sir *William Ashhurst*, but of the whole Court of *King's Bench*, stopping upon that Ground the Argument upon the Point as to the Breach of Trust *(a)*. Sir *Samuel Romilly* has put it fairly, that the Court is not to act upon the Supposition, that Corporations are constantly abusing their Duty by applying the Property not to Corporate Purposes; but on the other Hand, when a Case is brought forward, the Court is not to shut its Eyes against the Practice, that has prevailed in all Times, and the Judgment upon it; for, speaking of Corporate Purposes, if the Purpose, though the most worthy, that can be represented, has not that Character, the Use of the Seal is equally improper, and as much an Abuse in a Court of Justice, though not in moral Consideration. As to what obtains, for Instance, in the Ecclesiastical Bodies, that have been mentioned: the Bishop, the Dean and Chapter, &c., the Statutes, that Leases for more than Twenty-one Years, or Three Lives, and not at the old Rent, or more, shall be bad, do not say, that any Lease shall be good, which can be taken to be an Abuse of those Corporate Purposes, for which the Property was held; and I apprehend, it would not be difficult now to find Bishop's Estates, the old Rent reserved being £50, and the actual Estate worth, £1000 or £2000 *per Annum*. All the Excess of that Rent, taken by the Bishop himself, should, if he is a Trustee in a fair Sense, be taken from

(a) 2 Term Rep. 200. Lord *Mansfield* was absent.

1813. The Mayor and Commonalty of Colchester v. Lowten.

him by this Court: yet no such Attempt was ever made where the Corporation was not holding for Charitable Purposes. Even those Corporations can alienate at Law: but the Alienee will be a Trustee; and the Jurisdiction in those Cases must be regarded as a Contrast to the other Cases of Corporations, holding not for Charitable, but for Corporate, Purposes; demonstrating, that this Court shall not be called upon in the latter Case; as it is in the former.

Principle of Equity, that the Demand of Relief should be prompt. Distinction, whether, though it would be difficult to maintain under that Principle upon the Loss of other Remedies a Security invalid in Law and Equity, the Court would take away that Benefit.

The next Point I am called upon to consider is, whether these are Corporate Purposes. The *Attorney General* of that Day seemed to think the Mortgage good as to so much of *Lowten's* Bill as was incurred under the Authority of the select Body. That however is but private Opinion; and the Question is still open, whether that was a Corporate Purpose, or not. It is not necessary for me to determine, how many of the Purposes, where the Defendant was employed either by the express Authority of the Corporation, or by *Smythies*, as his Client, were corporate, or not: they appear to me much nearer that Description than many Purposes, to which Corporate Property has been actually applied: but my Judgment goes upon this. Though Courts of Equity have laid down, as a Principle, upon which they ought to act, that Persons, seeking Relief, should be prompt in their Application, and should not deal as if they did not mean to make any Application for Relief in Equity, suffering their Opponents to lose their Remedies against other Parties, I do not put my Judgment upon that Principle. It would be difficult to maintain, though the Court would struggle, as far as it could judicially, that, as the Defendant has lost his Remedy by the Death of *Smythies*, and the Dispersion, if I may use that Expression, of the select Body, therefore he can in Equity have the Benefit of that Secu-

rity,

rity, which is not a valid Security in Law and Equity: whether that Benefit could be taken from him by a Court of Equity is a different Consideration.

1815. The Mayor and Commonalty of Colchester v. Lowten.

My Opinion upon this Case is, that the subseqnent Transactions, which took place between these Parties, bound the Corporation at large. Their Constitution is this. The select Body have at least a Right to bind the Corporation by the Use of the Seal in Matters, as to which the Corporation at large could bind itself. Without detailing the Circumstances from the first Moment of this Demand, all the Correspondence upon the Part of the Town Clerk, which I take to be the Correspondence of both the select Body and the Corporation, all the Terms proposed as to Part-payment, &c., it is clear, that a Corporation may submit to Arbitration. If the Matter submitted can in no fair Sense be stated as Matter of Controversy, in which the Corporation could deal, such that a fair Consideration could view as connected with Corporate Purposes, I do not say, that such a Submission would bind: but, if it may be represented as a fair Question, whether corporate, or not, the select Body, being entitled to act, may submit that to Arbitration.

This was submitted to Arbitration; and there is not a Trace in that Transaction of any Inattention, or Want of due Attention, to the Interest of the Corporation at large. The select Body must, it is true, be considered in one Sense as the same Body, whose Acts are brought in Question; but in another Sense they are quite a different Body. Some of them are not the Individuals, whose Acts are brought in Question; and upon Examination my Conclusion is, that they did act as Persons exerting their best Attention for the Corporation at large. Not a Point was brought before the Arbitrator otherwise than as it would have been by an Agent, having no other View

1813. The Mayor and Commonalty of Colchester v Lowten.

than the Advantage of his Principal. The Award therefore is binding at Law; and was so conducted as to the Interests of the Corporation, that, unless bound to say, the Purposes, to which the Money was applied, can in no Sense be considered Corporate Purposes, I ought not to shake that Award.

Upon these Grounds I cannot give the Corporation the Relief, prayed by this Bill. The Costs of the Issues necessarily follow the Event; and this Bill imputing Fraud, when it is impossible that the Security could be cut down except upon the Principle of its Invalidity in Law or Equity, I should not do justice in this particular Case, unless I dismissed the Bill with Costs.

1810, *Nov.* 23, 26. 1813, *Jan.* 13.

TULK *v.* HOULDITCH.

Legacy reciting the Probability, that the Legatee was not living, upon express Condition, that he shall return to *England* and personally claim of the Executrix or in the Church Porch: if he shall not so claim within Seven Years, to be presumed dead, and the Legacy to fall into the Residue.

The Legatee not having returned, and dying abroad within Seven Years, the Legacy was held not due; the Existence of the Legatee, though appearing otherwise, being to be proved by the particular Means prescribed; and therefore not within the Cases from the Civil Law, where, the End being obtained, the Means were not essential.

Objections of Form, that the Plaintiff, originally claiming under a special Assignment, by Way of Supplement set up a different Title, as general Creditor, proceeding as such, not upon Proof of his Debt, but on the mere Admission of the Executor, against a Person, accountable to the Executor for Assets, not determined.

JOHN Lovelace by a Codicil to his Will, dated the 26th of *November*, 1796, disposed as follows: "I "give unto my Son *John Lovelace* at *Malaga* in the

"Kingdom

" Kingdom of *Spain* £2000 capital Stock, &c. Part of " my Stock in the Funds: but as I have not heard from " my said Son for a considerable Time, and there is a Pro- " bability that he may not be now living, I do hereby de- " clare my Will and Mind is, that the said Legacy is given " to him upon the express Condition that he shall not " be entitled thereto unless he shall return to *England* " and personally claim the same of my Executrix or her " Executors or Administrators or in the Church Porch " of the Parish Church of *Great Waltham* in the Pre- " sence of Two Witnesses; and in case my said Son shall " not return to *England* and claim the said Legacy in " Manner aforesaid within the Space of Seven Years " from the Time of my Decease then my Will and " Meaning is that he shall be presumed to be dead and " in such Case the said Legacy hereby given to him shall " be deemed a lapsed Legacy and sink into and become " a Part of the *Residuum* of my personal Estate; and I " hereby will and direct that the said Legacy shall be con- " tinued in the *Bank* by my Executrix for the Time " aforesaid after my Decease until sufficient Proof of the " Death of my said Son shall be produced or such " Claim thereof shall be made in Manner aforesaid " within that Period; and that the Dividends which " shall from time to time become due thereon shall be re- " ceived and vested in the same Fund to accumulate " together with the Dividends which shall become due " upon such accumulated Fund for the Benefit of my " said Son, in case he shall make his Claim thereto in " Manner and within the Period aforesaid, or otherwise " of my residuary Legatee."

The Testator died in *March*, 1797. *John Lovelace*, the Legatee, died at *Malaga* in *October*, 1803; at which Place he was residing at the Date of the Codicil, and when the Testator died, and continued to reside until his Death,

1813.

TULK

v.

HOULDITCH.

Death; never having ruturned to *England*, or personally claimed the Legacy; although he was apprised of it by Letter, dated the 16th of *June*, 1797, transmitting a Copy of the Will; the Receipt of which he acknowledged, expressing his Intention of coming to *England*, when his Affairs permitted him; and it was proved, that he died of the Yellow Fever just as he was embarking for that Purpose.

The Bill was filed against the Executor of *John Lovelace*, the Legatee, and against the residuary Legatee of the original Testator *John Lovelace*, who claimed the Legacy, as having fallen into the Residue. The Plaintiff by his original Bill set up a Claim under an Assignment to him of this Legacy from *Lovelace*, the Legatee; but afterwards filed another Bill, by Way of Supplement asserting his Title as a Creditor, suing on behalf of himself and all the other Creditors of *John Lovelace*, the Legatee. The Executor admitted the Debt; but did not admit Assets.

Mr. *Leach*, and Mr. *Boteler*, for the Plaintiff.

The substantial Part of the Condition, annexed to this Legacy, having taken Effect, the Appearance of the Legatee in the Church Porch is a Circumstance, that even in a Court of Law would not prevent the Legacy's vesting; and is therefore more clearly to be dispensed with in Equity. What Motive can be attributed to the Testator imposing this Condition? He assigns his Reason, leaving no Doubt of his Object; that, if his Son should die abroad, the residuary Legatee should not be kept out of the Property a considerable Time; requiring therefore, that the Executrix shall be perfectly satisfied of the Existence of the Legatee; and pointing out the Mode of giving

giving that Satisfaction; having no Purpose beyond that. The Executrix admits, that she was satisfied of the Existence of this Legatee by other Means, viz. the Letter received from him in 1801. How is the Declaration, that the Legatee, not claiming in Manner aforesaid within Seven Years, shall be presumed to be dead, consistent with the Notion, that there is something in the particular Mode, pointed out to satisfy the Executrix of the Fact, entitling the residuary Legatee?

1813.
TULK
v.
HOULDITCH.

This may be compared to the Case put by Lord *Coke (a)*, of a Condition to enfeoff a particular Person and instead of a Feoffment a Conveyance by Lease and Release executed: Lord *Coke* says, this in Law amounts to a Feoffment. The subtantial Part is, that the Party should have the Estate: and the Form is not essential. In *Rolle* it is said, "the Condition is per-"formed; for the Effect is performed." So the Substance of this Condition is, that the Executrix shall within Seven Years have Demonstration, that this Legatee was living, and she had that Demonstration. In all Cases of this Nature, Conditions as to Marriage, Powers of Revocation, &c. if the real Intention has been substantially performed, a Court of Equity does not insist on a rigid Adherence to particular Circumstances. It is evident, that the only Subject of this Testator's Contemplation was the Uncertainty of his Son's Life; and though in the latter Part of the Clause he appears to lose Sight of the particular Means by which he intended that his Executrix should be satisfied as to the Fact, the Reason, assigned in the Introduction, over-rides the whole. In *Pearsall* v. *Simpson* (b) Words of apparent Condition were held not to have that Effect. In *Broome* v. *Monk* (c)

(a) *Co Lit.* Estate upon Condition, 207. *a.*

(b) 15 *Ves.* 29.

(c) 10 *Ves.* 597. See 618.

your

1813.
TULK
v
HOULDITCH.

your Lordship expresses yourself thus: "Where there is "a general Direction to lay out Money in Land, the "Testator takes it for granted Land can be procured. "If a particular Estate is pointed out he conceives a "Title can be made. Upon the Point, whether, that "failing, it may be laid out in other Lands, after a Dif-"ference of Opinion between Lord *Thurlow* and Lord "*Rosslyn* it is established, that it may; that the parti-"cular Estate pointed out is only the Mode directed for "executing the primary Intention for a Purchase."

This Claim is supported by various Analogies from the Civil Law; under which a Legacy, if the Legatee should become *sui Juris* by the Death of his Father, was considered due upon the Legatee's becoming emancipated; and Legacies to Daughters on Condition that they were emancipated were due upon their becoming *sui Juris* by the Banishment or Death of their Father, or by other Means. *Voet (a)*, treating upon the precise Performance of Conditions, alludes to these Cases,

Another

(a) 2 *Voet ad Pandactas.* Lib. 28. T. 7. § 25. Sed et amplius conditiones plerumque specificè, ac ex prœscripto testatoris implendæ sunt, utcunque implementum alteri utile non sit. Hinc cum testator Mævio fundum legasset sub conditione, *si is decem dederit Callimacho*, cum quo non erat testamenti factio, conditioni Mævius parere debet, et decem dare, ut ad eum fundus legatus pertineat, licet nummos non faciat accipientis. Sed nec per æquivalens conditioni parere jura regulariter permittunt. Quâ ratione, si testator opus publicum in municipio per hæredem fieri jusserit, eumque sub hâc conditione instituerit, is autem paratus sit pecuniam dare reipublicæ, ut ipsa faciat, audiendus non est. Et qui honoratus est sub conditione, *si hæredi, vel alteri decem dederit*, cum is servus esset, ipsi servo, non domino ejus, dare debet, & vice versâ, domino dare jussus

Another View of this Case is, that the Legatee was prevented by the Act of God from making his Claim before

1813.
TULK
v.
HOULDITCH.

jussus, si servo ejus dederit, conditionem dandi implevisse haud videtur. Quin imo si hæres, cui legatarius conditionis implendæ causâ decem dare jussus erat, decem illa legatario accepto tulisset, non videri eum conditioni paruisse quasi *dederit*, *Julianus* ait; sed tamen, quasi per hæredem stet, quo minus pareat, posse petere legatum. Eodemque ex fundamento nec per compensationem impleri posse dandi conditionem dictum in Tit. *De Compensat.* num 16 post. med. Si tamen conditio testamento inserta sese habeat tanquam medium & via ad finem ulteriorem, etiam modo alio quam qui per testatorem expressus erat, implementum accipere potest, & relicta deberi. Unde si cui fideicommissum ita fuerit relictum, *si morte patris suijuris fuerit effectus*, & is emancipatione sui juris factus sit, aut patris sui deportatione, non videri defecisse conditionem & responsum & rescriptum est: eo quod testator tali conditione non aliud intenderit, quam ut ipsi filio, non autem patri jure patri potestatis relicta quærantur. In libertate quoque legatâ sub conditione dandi certam rem etiam rem aliam, aut æstimationem ejus, dari posse, jure singulari, favore libertatis, a *Justiniano* constitutum est.

The following authorities were also referred to:

Dig. Lib. 32. Tit. 1, lex. 11. § 11.

Si cui ita fuerit fideicommissum relictum, si morte patris sui juris fuerit effectus, et emancipatione sui juris factus sit, non videri deficisse conditionem; sed & cum mors patri contingat, quasi extante conditione ad fideicommissum admittetur.

Cod. Lib. 6. Tit. 25, lex. 3.

Si mater vos sub conditione emancipationis hæredes instituit, & priusquam voluntati defunctæ pareretur, sententiam deportationis pater meruit, vel aliter defunctus est, morte ejus, vel alio modo patriâ potestate liberati, jus adeundæ hæreditatis cum suâ causâ quæsistis.

Cod. Lib. 6. Tit. 46, lex. fin. 7.

1813.

TULK v. HOULDITCH.

before the Expiration of the Time; falling a sudden Victim to the Yellow Fever. No Laches can be imputed; as there was no Reason for claiming at an earlier Period.

Mr. *Lovat*, for the Defendant, the Executor, merely stated, that he admitted the Plaintiff's Debt; but declined proceeding for it.

Sir *Samuel Romilly*, and Mr. *Johnson*, for the Defendant, the residuary Legatee.

The first Objection is one of Form; which makes it impossible to decide the Question in this Cause. This Bill must be dismissed; as being filed by a Person, who has no Interest to sustain the Suit; alledging, that he is a Creditor of a Legatee; and in that Character filing a Bill against the personal Representative of that Legatee, and the residuary Legatee of the original Testator. The Executor is not asked, whether he has Assets independent of this Legacy. The original Bill was filed, not on behalf of all the Creditors, but by this particular Creditor in his individual Capacity, claiming under an Assignment of this Legacy: an Injunction, restraining a Transfer, was obtained; and a supplemental Bill, though not properly such, was afterwards filed in a different Character, as a Creditor suing on behalf of himself and all others. Waiving that Irregularity however, this is open to another Objection, established in *Utterson* v. *Mair* (a), *Elmslie* v. *M'Aulay* (b) and other Cases, noticed in *Alsager* v. *Rowley* (c), that Collusion, or Insolvency, or perhaps gross Negligence of the Executor, must be the Foundation of a Bill by a Creditor against a Per-

(a) 2 *Ves.* 95. 4 *Bro. C. C.* 270.

(b) 3 *Bro. C.C.* 624.

(c) 6 *Ves.* 748. See *Burroughs* v. *Elton*, 11 *Ves.* 29.

son

son accountable to the Estate; which special Case must be established by Evidence, and cannot rest upon the mere Admission of the Representative. Your Lordship, citing *(a)* the Case of *Beckley* v. *Dorrington*, agrees with the Doctrine, stated by Lord *Hardwicke*. Here is no Evidence of Collusion: but the Bill states, and the Executor admits at the Bar, merely that he has not thought proper to file a Bill. Is that the special Case required? The Plaintiff has not even proved himself a Creditor; but goes upon the Admission by the Executor of the Debt set up, Twenty-eight Years old. What an Opening to Fraud!

Upon this Will the Intention is clear to impose on this Legatee, as a Condition precedent, the Necessity of returning to *England* and in Person claiming the Legacy. The Testator uses Words of express Condition. Evidence may be read, though not of Declarations to explain the Will, of Facts, coming to his Knowledge afterwards; and the Fact of his Knowledge, that his Son was living, is established by a Letter, proved as an Exhibit, received from him in *March*, 1797; with Two Postscripts: one in *December*, 1796: the other in *January*, 1797: yet with that Knowledge, that his Son was living, the Testator died without altering his Will. If it could be shewn, that his only Object was to ascertain, that his Son was living, and this was the Mode adopted, certainly upon the Authorities the Legacy would be due: but, as there was the farther Object, that he should return to *England*, and in Person claim this Legacy, that Object not being fulfilled, the Claim cannot be supported. Another Letter from the Son, in 1797, acknowledging the Receipt of the Intelligence of his Father's Death, shews, that he did not intend to comply with the Condition; meaning, that the Legacy

(a) 6 *Ves.* 749

1813.

TULK v. HOULDITCH.

should go to his near Relation the residuary Legatee. That Letter speaks of this Passage in the Will; represents the Absurdity of supposing him dead, though he was in constant Correspondence with several Persons, to whom his Father might have applied for Information. At this Period, some Time after the Testator's Death, the Legatee, fully apprised of the Condition, does not choose to claim the Legacy; and indicates no Intention of claiming it: his personal Representative therefore cannot claim it either upon the Ground, that the Condition should be dispensed with, or that the Legatee had Seven Years to make the Claim in. The Answer to such Claim is, that this was a Condition precedent; and nothing but Death in too short a Time to admit of returning to *England* could dispense with it.

Mr. *Leach*, in Reply.

The Objection of Form, that there is no Privity between the original and supplemental Bills, (though this seems not supplemental, but an original Bill in the Nature of a supplemental Bill,) is cured by the Admission of the Executor at the Bar; which is a sufficient Foundation for the Jurisdiction; as, unless Collusion can be shewn, all Persons, who could institute another Suit, would be bound by the Decree in this Suit: the Executor; and all, who could claim under him: all the other Creditors; who, with the Exception of Collusion, can claim only through the Executor. This is the Case of an Executor, who having no Assets, declines trying this Question at his own Expence; which gives the Creditor the Right to try it: the Executor's so declining, though his Motive may be excuseable, having the Effect of Collusion. The substantial Inquiry is, will the Executor do Justice to the Estate: if not, whatever is the Motive, proper or improper, the Party interested must have the Right to prosecute the Claim.

The

The Testator states upon the Face of his Will his Reason for giving the Legacy in this Way, the Probability, that his Son was not living, and the Ground of that Inference; not having heard from him for a considerable Time. On account of that Uncertainty the Enjoyment of this Legacy by the Niece is suspended for Seven Years, but no longer. In the Cases from the Civil Law, which stand upon this Reason, that before Emancipation the Legacy would be a Gift to the Father, the Question was, whether the Testator set any Value upon the Means, or considered them only as Means of obtaining the End: which was to give the Legacy as soon as the Legatee was capable of enjoying Property: but the Testator looked only to one Mode of requiring that Capacity, the Father's Death, not the Son's Emancipation; and the Reasoning of the *English* Law is the same in the Case of a Condition to enfeoff, the Party conveying by Lease and Release: the Intention is substantially performed by passing the Estate: yet it may well be supposed, from the different Nature of those Modes of Conveyance, that a Value was set upon the Means. The Consequence stated, that this Legatee shall be presumed to be dead, is conclusive, that the End, not the Means, was the Testator's Object; that he set no Value upon the Means. On that Supposition he would have declared the Legacy forfeited: but to his mere Appearance in the Church no Importance could be attached with reference to the Testator's Object. He might appear there without any Evidence personally to the Executor; and the Condition would be performed: but the Reason of such a Condition must be regarded; that a Possibility may be afforded to the Executor of obtaining clear Proof in this Country, that the Legatee was alive, and the Executor might be satisfied of that Fact by other Means, by Correspondence, for instance, with the Legatee, precluding all Doubt, and making the Medium of Proof pointed out unnecessary. The whole

1813.

TULK v. HOULDITCH.

Object of the second Breach of this alternative Condition is to secure satisfactory Means of proving that Fact; which Fact is acknowledged by the Person, who was to take in the Event of the Death of this Legatee, and, being in direct Correspondence with him, could have no Doubt of his Existence.

The Lord CHANCELLOR.

The formal Objections, taken to this Bill, well deserve Consideration: first, that the Suit is instituted upon an original Bill by a Person, stating himself to be the Assignee of this Legacy, and what is called a supplemental Bill by the same Person on behalf of himself and all other Creditors: secondly, a more material Objection, whether a Creditor can claim this Legacy upon the Ground, that it is necessary for the Satisfaction of his Debt; not making that out otherwise than by the parol Declaration of the Executor, not even asserting upon his Oath, that he has not Assets, but asserting that at the Bar. I conceive, that the Individual, who has the Property in her Hands, is entitled to insist, that the Creditor shall prove, that he is such; and the Admission of the Executor is not sufficient: on the contrary there would be a Right to cross-examine that Proof. That however would lead to the Proposition, that the Court would give Liberty to examine; but upon the other Objection of Form it is necessary to examine this Record; and unless it is different from the Representation of the Defendant, I do not see an Answer to the Objection.

These Objections of Form, which are too material to be overlooked, may make it unnecessary to decide, whether this Legacy can be claimed; depending upon a Principle, that requires great Attention. All the Cases from the Civil Law upon my Recollection of them lay down, that

that where the Condition prescribes the Means, the End being obtained, the Means are overlooked; and then, stating the Cases of Emancipation, that have been referred to by Mr. *Boteler*, they proceed to say, that this is in Favor of Liberty, or may be done upon Legacies *ob pias Causas*, and some of them make a Distinction even as to a Child in this Respect.

1813. Tulk *v.* Houlditch.

Mr *Boteler* said, the Passage as [illegible] being in Favor of Liberty relates merely to the Emancipation of Slaves.

The Lord Chancellor.

I think this Legacy is not due under the Circumstances. The Cases, cited from the Civil Law, are distinguished in this Respect. In those Cases, where the Legacy was considered due, the Means, by which the Party appeared to be living, were not thought to be essential: if the Fact was otherwise established, it was sufficient: but there is in this Will Language plainly shewing, that the Testator did not mean the Legacy to be taken, unless the Fact, that the Party was living, was pointed out by the Means, by which the Testator required that Demonstration.

The Consequence is, that the Bill must be dismissed without Costs

1813.
Feb. 5, 8, 9.

KING *v.* DENISON.

Construction of a Devise in Fee subject to and chargeable with Annuities upon the Intention, collected from the whole Will, a beneficial Devise, and not a Trust resulting to the Heir as to the Surplus beyond the Annuities.

FRANCES *Isaacson* by her Will, dated the 29th of *March*, 1750, beginning with a Direction, that all her just Debts shall be paid or satisfied, made the following Disposition: "I do hereby order and dispose of my " Estates in the following Manner. I give, devise, and " bequeath all that my Manor or reputed Manor of *Fenton*, &c., and all other my real Estate whatsoever and " wheresoever unto my Cousin *Mary Altham*, Wife of " *Roger Altham*, of *Doctor's Commons*, *London*, Esq. " and to my Cousin *Arabella Isaacson*, and their Heirs " and Assigns for ever, subject nevertheless to and chargeable with the Payment of the following Annuities hereinafter mentioned; that is to say, to my Brother *William Isaacson* the Annuity or yearly Sum of £100 " given and devised to him by my Father's Will and also " a farther Annuity of yearly Sum of £50 which I give " him during his Life: to my Sister *Sarah Isaacson* the " Annuity or yearly Sum of £60 given and devised to her " by my said Father's Will; also a farther Annuity or " yearly Sum of £90, which I give her during her Life, " for her sole separate and personal Use, exclusive of her " Husband, who is to have no Power to receive, &c. the " same, &c. And I do order that the Receipts of my said " Sister alone whether covert or sole, &c. shall be good " and sufficient Discharges for the same;" and after her Decease the Testatrix gave the same Annuity of £150 to her Sister's Son Henry *Creagh Isaacson* for Life, and after his Decease to any other Child or Children of her Sister *Sarah Isaacson* living at the Death of the Testatrix and to the Survivor of such Children during their respective natural Lives, and if but one, then to such only Child for

for his or her Life. The Testatrix gave to her Aunt *Margaret Isaacson* an Annuity of £100 for Life "and "after her Decease I give to my Brother *Anthony Isaac-* "*son* on his Life an Annuity of £150" which after his Decease was to be divided amongst his Children for their Lives; and after giving another Annuity of £20 to her Cousin *Catharine Isaacson* she thus proceeds:

1813.

King v. Denison.

"All which Annuities I will and direct shall be paid "quarterly &c. and I do hereby charge my real Estate "with the Payment thereof."

The Testatrix gave her personal Estate (with a slight Exception) to *Roger Altham*, *Edmund Byron*, and *Giles Alcock*, their Executors and Administrators, "subject to "and chargeable with the Payment of my just Debts and "the Legacies hereinafter mentioned;" among which were Legacies to her Brothers *Anthony* and *William Isaacson*: to her Cousin *Mary Altham* a Legacy of £100: to her Cousin *Arabella Isaacson* £200, and to *Roger Altham*; *Edmund Byron*, and *Giles Alcock* £200 a-piece. The Testatrix then declared, that the Annuity of £150, given to her Brother *William Isaacson* for his Life, should after his Death go to his Children, and after their Deaths One Moiety of it to her Sister *Sarah Isaacson*, and after her Death to her Children, living at the Decease of the Testatrix. The Will then proceeded thus:

"And as to the other Moiety of the same Annuity, to- "gether with the surplus Profits of my said real Estate "to be computed from the Time of my Decease, I give "to my Brother *Anthony Isaacson* for his Life and after "his Death to such of his Children as shall be living at "the Time of my Death and to the Survivors and Sur- "vivor of them during their respective natural Lives; and "my farther Will is, that after the several Deceases of my

1813. King v. Denison.

"said Sister and her Children the said annual Sum of "£150 and the £75 as aforesaid given to her, and them, "shall go to my said Brother *Anthony* for Life, if he "shall be then living, and if he be dead, then to such of "his Children and the Survivor and Survivors of them "that shall be living at my Death; and in case of his and "their Deaths first happening then my Will is that the "whole Rents and Profits of my said real Estate shall go "and be paid to my said Sister *Sarah Isaacson* during her "Life, if she shall be then living, and if she shall be dead, "then to be paid to such of the surviving Child or Chil- "dren of my said Brother and Sister that shall be living "at the Time of my Decease for his, her, or their natural "Life or Lives only." The Testatrix appointed *Roger Altham*, *Edmund Byron*, and *Giles Alcock*, Executors.

By a Codicil, dated the 12th of *April*, 1752, the Testatrix gave a few Legacies; declaring, that she did thereby charge and subject her real and personal Estate with the Payment thereof; adding, "but it is my Desire that my "personal Estate shall be first applied in ease and Ex- "oneration thereof and of the other pecuniary Legacies "in my Will mentioned wherewith I have charged my "personal Estate with the Payment in Manner therein "expressed."

The Testatrix died in 1753, leaving *Anthony Isaacson*, her eldest Brother, and Heir at Law, surviving. All the Persons, to whom Annuities were given, being dead, the Heir at Law of the Testatrix claimed her real Estates, on the Ground, that they were devised to *Mary Allanson* and *Anthony Isaacson* for particular Trusts only; which being satisfied, the Heir was entitled by way of resulting Trust. For the Purpose of trying this Question an Ejectment was brought by the Devisees against the Heirs, and a Verdict was given for the Devisees, subject

ject to the Opinion of the Court of *King's Bench.* The Case was argued on the 18th of *November*, 1812, when the unanimous Judgment of the Court was, that the Devisees were entitled to recover, and the Verdict ought to stand.

The Bill was then filed by the Heirs at Law; praying a Declaration, that they were entitled to the whole beneficial Interest in the Estate devised to the Defendant *Arabella Denison*, formerly *Isaacson*, and *Mary Altham*, a Conveyance of the legal Estate, and an Injunction.

The Defendant *Arabella Denison* by her Answer stated, that she was at the Time of the Decease of the Testatrix an Infant of the Age of Seventeen Years. The other Defendant's demurred to the Bill for Want of Equity. Upon this Demurrer and a Motion for an Injunction, the Cause came on.

Sir *Samuel Romilly*, Mr *Hargrave*, and Mr. *Benyon*, for the Plaintiffs, the Heirs at Law.

In order to constitute a Devisee a Trustee, it is not indispensably necessary, that the Words "in Trust" should be employed: if the Intention appears, that the Devisee shall be a Trustee, that is sufficient according to the Doctrine of Lord *Hardwicke* in the important Case of *Hill* v. *The Bishop of London* (a); and that Intention is manifest upon the whole Frame of this Will. The Terms "subject to and chargeable with" are synonymous with "in Trust." Upon what Principle can it be inferred, that a beneficial Interest was intended to be given to these De-

(a) 1 *Atk.* 618,

1813.

KING
v.
DENISON.

visees? There was no Possibility, that they could derive any Advantage from it for a great Number of Years probably they would not survive the Trusts expressly created, and whose Descendants would be entitled depended on Accident since, whether the Devisees took in Trust or beneficially, they were Joint-tenants. It is not immaterial, that the Purposes, for which they were appointed, necessarily required, that they should have the legal Estate vested in them. The Testatrix, having the same Intention with respect to her personal, and her real, Estate, gave Legacies to these Devisees: could she then mean to give them the beneficial Interest in her real Estate? No Passage of the Will indicates that Intention; and the clear Principle of Law is, that an Heir shall not be disinherited without express Words or necessary Implication (*a*). If this Case had arisen upon a Deed, for Instance a Feoffment, without Consideration, to *A.* and his Heirs, to the Use of *B.* for Life, with Remainder to the Use of *C.* in Tail, the Deed stopping short with that Limitation, there would be a resulting Use for the Heir, carrying the legal Fee (*b*). A Will however, importing Bounty, the Presumption is, that a beneficial Interest was intended: the Heir is therefore required to shew, that, though not in Words, yet in Effect, this is a Trust: substantially a Devise in Fee in Trust for particular Purposes, not exhausting the whole beneficial Interest. The Devise is followed by several Annuities, which are so many Provisions for Life, for her Brothers and Sister; indicating at least no Hostility towards them. In the Bequest of the personal Estate, where the same Terms are used as in the disposing of the real Estate, "subject to and chargeable with," did she intend to make the Executors, having equal Legacies,

(*a*) See *Boutell* v. *Mohun* Prec. Ch. 381. *Sympson* v. *Hornsby*, *ibid.* 439; and *Pigot* v. *Penrice*, *ibid.* 471.

(*b*) *Co. Lit.* 23, *a* 271, *b.*

Trustees

1813. King v Denison.

Trustees for the next of Kin? If that must be the Construction, why should not the same Language, applied to the real Estates, accompanied too by Legacies to the Devisees, have the same Effect, creating a resulting Trust for the Heir at Law? The Devise of the "surplus Profits" of the real Estate to her Brother and Heir at Law shews, that the Testatrix, giving her real Estate to her Two Cousins, charged with the Annuities, had a farther Purpose. This, if not a legal Estate, is at least another express Trust. The Devise indeed, is so surrounded, so implicated and blended with Trusts, that the direct Use of that Term could not more strongly mark the Character of the Devisees By such a series of Trusts the subsequent Interest, whoever has it, is postponed to a very remote Period. The Conclusion upon the whole is, that she never meant to give the Residue to the Devisees; that making a partial Disposition she had no farther Object; and the Consequence of Law is, that the Residue of the beneficial Estate not exhausted results to the Heir.

The Doctrine, that where there is a Devise upon Trust for particular Purposes, which do not exhaust the whole beneficial Interest, the Surplus shall be a resulting Trust for the Heir at Law, is to be found in numerous Cases: *Hill* v. *The Bishop of London* (a), *Hill* v. *Cocks* (b), *Stansfield* v. *Habergham* (c), *Lloyd* v. *Spillet* (d), *Davidson* v. *Foley* (e): *Packington* v. *Wych* (f), and the

(a) 1 *Atk.* 618.
(b) *Ante*, page 173.
(c) 10 *Ves.* 275. 280.
(d) 2 *Atk.* 280.
(e) 2 *Bro.* C. C. 203.
(f) Cited by Mr. *Hargrave* from C. B. *Ward's* MS. The Case afterwards went to the House of Lords. See *Wych*, Appell. and *Packington*, Respond. 1 *Bro.* P. C. 372.

Cases

1813.

KING v. DENISON.

Cases collected in Mr. *Sanders*'s Notes (a) to *Hill* v. *The Bishop of London*. In *Packington* v. *Wych* a Term was created for Fourteen Years to pay Debts; and the Surplus was held a resulting Trust for the Heir. In a doubtful Case the Decision ought to be in Favor of the Heir; whose Right the Law favors. When a Person is once appointed Trustee, expressly or by Implication, there must be the most unequivocal Declaration to make him take beneficially. In *Harton* v. *Harton* (b) a Devise to Trustees and their Heirs upon Trust to permit a *Féme Covert* to receive the Rents during her Life for her sole and separate Use, with Remainders to her first and other Sons &c. vested the legal Estate in the Trustees. The Plaintiff's Construction, that this is a Trust to a certain Extent only, all beyond that resulting to the Heir, renders the Will simple and consistent. The Terms, "Surplus

(a) The Cases collected by Mr. *Sanders* as Instances of the *general Rule*, are, *Randall* v. *Bookey*, 2 *Vern.* 425. Prec. Ch. 162. S. C.—*City of London* v. *Garway*, 2 *Vern.* 571.—*Hobart* v. *Suffolk*, 2 *Vern.* 644.—*Bristol* v. *Hungerford*, 2 *Vern.* 645.—*Starkey* v. *Brooks*, 1 *P. Wms.* 390.—*Cruse* v. *Barley* 3 P. *Wms.* 20.—*Stonehouse* v. *Evelyn*, 3 P. *Wms.* 252.—*Digby* v. *Legard*, 3 *Cox's P. Wm.* 22.—*Gravenor* v. *Hallum*, *Amb.* 643.—*Arnold* v. *Chapman*, 1 *Ves.* 108.—*Ackroyd* v. *Smithson*, 1 *Bro.* Ch. Ca. 503.—*Leslie* v. *Devonshire*, 2 *Bro.* Ch. Ca. 188.—*Robinson* v. *Taylor*, ibid. 589.—*Hutcheson* v. *Hammond*, 3. *Bro.* Ch. Rep. 128.—*Spinks* v. *Lewis*, 3 *Bro.* Ch. Rep. 355.—*Sherrard* v. *Lord Harborough*, *Amb.* 165.—*Robinson* v. *Taylor*, 1 *Ves.* jun. 44. As Instances of the *Exceptions*, Mr. *Sanders* cites *Coningham* v. *Mellish*, Prec. Ch. 31.—*Rogers* v. *Rogers*, *P. Wms.* 193.—*Mallabar* v. *Mallabar*, Cas. temp. *Talbot*, 78.—*Durour* v. *Motteux*, 1 *Ves.* 320.—*Cook* v. *Duckenfield*, 2 *Atk.* 562.—*Wright* v. *Row*, 1 *Bro.* C. C. 61.—*Popham* v. *Lady Aylesbury*, *Amb.* 68.—See *Wright* v. *Wright*. 16 *Ves.* 188, and the References in the Note (a), 190, to other late Cases.

(b) 7 T. R. 652.

"Profits,"

1813. King v. Denison.

"Profits," cannot mean the Estate itself. Who then was to repair, to pay the Taxes, and the Annuities, but the Devisees, as Trustees? The Observation has been frequently made, that there is no Magic in Words, when the Intention is clear. The Word "Cousin," by which she denominates the Two Devisees, cannot be considered material, since she uses the Terms "Brother," "Sister," or some other Term of Relationship, when she speaks of the Annuitants, and most of the Legatees.

Mr. *Leach*, Mr. *Bell*, and Mr. *Dowdeswell*, for the Defendants.

Admitting, that under a Devise for particular Purposes this Court will presume, that those Purposes limit the Devise, and, when they are satisfied, the Heir shall take, that Rule is liable to Exception, if a contrary Intention is to be collected from the whole Will. Thus, if the Testator has expressed a particular Affection for the Devisee, the general Rule has not prevailed against the Inference of Benefit to the Devisee; but it is contended, that where there is, as in this Case, from the generality of the Devise a partial Exception in the Shape of an equitable Interest, that Inference of Benefit, intended by the general Devise, is not to be collected. Can it be maintained, that a Devise to *A*. in Trust to sell to pay Debts is the same as a Devise to *A*. subject to and chargeable with Debts? The Proposition goes to that Extent. The Effect of Legacies to Executors, making them Trustees for the next of Kin, by Analogy to which this Construction is supported, is the Consequence of Law, not the Result of Intention, but generally counteracting it. That Rule, however, cannot apply, where there is an express Gift of the Surplus to them; and the Propriety of the Rule, and the Reason, upon which it is founded, that a Man cannot take both a Part and the Whole, have been much questioned; and Circumstances much

1813.

KING
v.
DENISON.

much slighter than those of this Case have prevailed against it. *Harton* v. *Harton* was a Devise expressly upon Trust; and the Trust, if it had not been for a *Féme Covert*, would have been a Use executed by the Statute. The Terms of this Devise, "subject to and chargeable "with" these Annuities, import a legal Rent-charge, and the Inference of Trust from the Situation of One of several Annuitants, being a married Woman, is repelled by the independent Character of the others. The Objection from the Remoteness of the Period, at which the Benefit of this Devise is to come into Possession, is removed by the Fact, that all the Lives, during which it was suspended, were in Existence at the Decease of the Testatrix; and therefore, according to the usual Expression, all the Candles were burning at the same Time. If, however, she contemplated an Interest beyond the Lives of those Persons, why could she not devise it, rather than permit it to descend to her Heir? The Joint-tenancy is accounted for by the Remoteness of the Benefit, which was to fall to the Survivor, according to the Event. The Inference of Benefit intended arises fairly from the Use of the Word "Cousin," indicating Affection, and an Intention of Benefit beyond the particular Purposes; a Reason, which prevailed in *Coningham* v. *Mellish* (a), and *Rogers* v. *Rogers* (b), and in *Hobart* v. *The Countess of Suffolk* (c) the same Effect was prevented by the Circumstance, that One only of the Devisees was a Cousin. A material Distinction of this Case is, that it is a Devise of the entire Estate, and the Annuities are only partial Exceptions; and though in Deeds the Want of Consideration has been held to create a resulting Use for the Grantor, upon Wills a different Construction prevails; a Devise, being *primâ facie* a Bounty, requires no Con-

(a) Prec. Ch. 31. temp. *Talbot*, 268. S. C.
(b) 3 P. *Wms.* 193. Ca. (c) 2 *Vern.* 644.

sideration,

1813.
KING v. DENISON.

sideration. The Infancy of the Devisees, not only at the Time of making the Will, but at the Death of the Testatrix, though considered unimportant, is a strong Indication, that the Testatrix meant to give them the beneficial Interest; not to make them Trustees; corresponding with the general Doctrine of this Court: *Taylor* v. *Taylor* (*a*), *Mumma* v. *Mumma* (*b*), *Lampleigh* v. *Lampleigh* (*c*), and *Blinkhorn* v. *Feast* (*d*). This Question has been decided upon the Merits by a Court of competent Jurisdiction, no express Trust "to receive and pay," "to "permit or suffer," &c. Terms, which in most Cases vest the legal Estate: nor is it "to repair," or "pay Taxes," as in *Shapland* v. *Smith* (*e*). There is nothing which requires the Interposition of Trustees; and the Heir is clearly disinherited by Words importing Bounty. In *Hill* v. *The Bishop of London* Lord *Hardwicke* states, that each Case must depend upon its peculiar Circumstances; an Opinion, in which the *Master of the Rolls* coincides in *Walton* v. *Walton* (*f*), observing, that it is not universally true, that the Expression of a Purpose, for which even a Devise of Land is made, limits the Devise to the Purpose, so expressed. The Case of *North* v. *Crompton* (*g*) bears a striking Resemblance to this: the Heir in each Case taking an Interest; the Devisees having nothing, unless the Devise was beneficial. *Philips* v. *Hele* (*h*), *Docksey* v. *Docksey* (*i*), *Kennett* v. *Lord Beauclerk* (*k*), and *Jackson* v. *Hurlock* (*l*). As to the abrupt Manner, in which the Testa-

(*a*) 1 *Atk.* 386

(*b*) 2 *Vern.* 19; and see Mr. *Raithby's* Note

(*c*) 1 P. *Wms.* 112; and see Mr. *Cox's* Note.

(*d*) 2 *Ves.* 27. See 30.

(*e*) 1 *Bro.* C. C. 75.

(*f*) 14 *Ves.* 318. See 322.

(*g*) 1 Ch. Ca. 196. See 2 *Vern.* 253.

(*h*) 1 Rep. Ch. 120.

(*i*) 3 *Bro.* P. C. 39.

(*k*) 3 *Bos.* & *Pull.* 175.

(*l*) 6 *Amb.* 487.

trix

1813. KING v. DENISON.

trix stops after the several Annuities for Life, it was unnecessary, after having devised the Fee, to repeat it.

Sir *Samuel Romilly*, in Reply.

The Authority of *North* v. *Crompton* has been impeached by many subsequent Decisions; and no Doubt remains at this Day, that a Legacy to the Heir at Law, or the next of Kin, will not preclude their Claim of the Surplus undisposed of. *Randall* v. *Bookey (a)* is a direct Authority against *North* v. *Crompton*, and in Favor of the resulting Trust. The only Question here is, whether, a Trust being evidently intended upon the whole Will, an express Declaration of Trust is indispensible? In *Hill* v. *The Bishop of London*, which states distinctly the Rules, that must govern this Case, the Exordium indicates an Intention to dispose of every Thing: the Testator's Mother-in-Law was the great Object of his Bounty; and it is not easy to account for Lord *Hardwicke's* Doubt upon the Construction, which he finally adopted. Here is an express Declaration, that the Receipt of a married Woman shall be a Discharge: to whom but the Devisees as Trustees? A Decision in Favor of the Devisees must suppose, that the Testatrix intended to give a partial Interest to her Brother and Sister, her nearest Relations, and that afterwards the whole Estate should go to Strangers, or very distant Relations, then unborn. Can any Disposition be imagined more improbable or capricious than such a Preference of the Descendants of her Cousins to the Exclusion of the Descendants of her own Brothers and Sister? The Case of *Coningham* v. *Mellish* did not turn upon the Word "Cousin," only. The Devisee was as near of Kin as the Heir to the Testator; and was appointed Executor; but, as the Debts

(a) 2 *Vern.* 425. Prec. Ch. 162. S. C.

exhausted

exhausted the personal Property, he would have taken nothing, either as Executor, or Devisee, if the Surplus of the Land had been held a resulting Trust for the Heir. The Case of *Rogers* v. *Rogers*, which is better reported in *Forester* (a), though the Devisee was described as his dearly beloved Wife, proceeded upon the Declaration that she was "sole Heiress and Executrix of all his Lands "and real and personal Estate to sell and dispose thereof "at her Pleasure." The Objections from the Infancy of one of these Devisees, and the Coverture of the other, the Improbability, that such Persons were intended to be mere Trustees, is answered by the Distance, to which the Trusts were likely to extend, and the Circumstance, that the married Woman was the Wife of a professional Man, competent to advise her in the Discharge of her Duty as a Trustee. The Case of *Mumma* v. *Mumma* is not satisfactory. If Infants can be Trutsees for Payment of Debts, why not for other Purposes? In *Blinkhorn* v. *Feast* (b) Lord *Hardwicke* relied upon Infancy only as one of several Circumstances. The Rule, that an Executor, having a Legacy, is a Trustee of the Surplus for the next of Kin, depends, not upon a legal Inference, but on the presumed Intention: the Law giving the Surplus to the Executor.

If the Devise of an Estate charged with Debts will carry the whole Fee, subject to the Charge, the Question is, under all the Circumstances, whether, this being a Devise of the whole Fee upon certain Trusts, which do not exhaust the whole beneficial Interest, the Heir is not entitled to that, which remains, as a resulting Trust.

The Lord CHANCELLOR.

The Decision of the Court of *King's Bench* I consider

(a) *For.* 268. (b) 2 *Ves.* 27.

as

1813.
KING v DENISON.

as having determined this, and this only; that the Testatrix does not give to her Heir at Law, or leave in him, after all the particular Estates determined, a legal Estate, upon which an Ejectment could be maintained; and the Court, if they entered into the Consideration, whether the Two first Devisees did, or did not, take the beneficial Interest, as well as the legal Estate of Inheritance, subject to the particular Estates, either legal or equitable, given to other Persons, could not take that View of it, except to enable them to determine, whether the Testatrix intended to sever the legal and beneficial Interests; with the View to determine farther, whether the legal Interest was, or was not, in the Devisees. Their Opinion, I believe, was, that both the legal and equitable Interests were in the Devisees; and that is to be estimated as an Opinion, expressed only with a View to the Determination of another Question.

Distinction between a Devise, charged with Debts, and on Trust to pay Debts. The former a beneficial Devise, subject to the particular Purpose: the latter limited to the particular Purpose; and therefore the Interest not exhausted a resulting Trust for the Heir.

The Principles, applicable to this Case, are very well settled. I adopt those, expressed in *Hill* v. *The Bishop of London* (a), as affording the Grounds, upon which Lord *Hardwicke* proceeded: but I will here point out the nicety of Distinction, as it appears to me, upon which this Court has gone. If I give to *A.* and his Heirs all my real Estate, charged with my Debts, that is a Devise to him for a particular Purpose, but not for that Purpose only. If the Devise is upon Trust to pay my Debts, that is a Devise for a particular Purpose, and nothing more; and the Effect of those Two Modes admits just this Difference. The former is a Devise of an Estate of Inheritance for the Purpose of giving the Devisee the beneficial Interest, subject to a particular Purpose: the latter is a Devise for a particular Purpose; with

(a) 1 *Atk.* 618.

no Intention to give him any beneficial Interest. Where therefore the whole legal Interest is given for the Purpose of satisfying Trusts expressed, and those Trusts do not in their Execution exhaust the whole, so much of the beneficial Interest as is not exhausted belongs to the Heir: but, where the whole legal Interest is given for a particular Purpose, with an Intention to give to the Devisee of the legal Estate the beneficial Interest, if the whole is not exhausted by that particular Purpose, the Surplus goes to the Devisee; as it is intended to be given to him.

Trust by Implication without the Word "Trust."

This is the Meaning of the several Passages in *Hill* v. *The Bishop of London* (a), and other Cases, before Lord *Hardwicke;* who marks the Distinction, that the Word "Trust," was not made Use of. That is a Circumstance, to be attended to; but nothing more; and, if the whole Frame of the Will creates a Trust, for the particular Purpose of satisfying which the Estate is devised, the Law is the same, though the Word "Trust" is not used: but then the whole Will must create a Trust, for the particular Purpose of satisfying which the Estate is devised.

Admitting these Principles to be, as they are demonstrated to be by all subsequent Authorities, the Question is, what is to be the Determination upon this particular Will; taking into Consideration the whole of its Contents? Are the Lands devised for the mere Purpose of discharging particular Trusts: or is an Intention expressed, that the beneficial Interest should be taken with reference to that Part of the legal Estate, not given upon particular Trusts?

(a) 1 *Atk.* 618.

1813.

KING
v.
DENISON.

Devise after a Direction, that all the Debts shall be paid, amounts to a Charge.

This Will, made Sixty-three Years ago, begins with a Direction, that all the Testatrix's just Debts shall be paid or satisfied: that is, in other Words, exactly the same as if she had given all her real Estate subject to and chargeable with her Debts: and the Meaning of that would be, not to devise for the Purpose of paying the Debts but to give the Estate with a Charge upon it of the Amount of the Debts. I do not say, there may not be context in a Will, that would give another Construction to the Words "subject and chargeable"; and the Question is, whether those Words in a subsequent Passage have the ordinary Meaning; or whether upon the whole Context the Court is forced to say, they are not used in their ordinary Sense; but that the Estate was given for the particular Purpose of enabling the Person, taking the legal Estate, to make those Payments?

The Testatrix, having thus charged her Debts, and only her Debts, by Implication upon the Person, taking the real Estate, disposes of her personal Estate in the following Manner. I collect from the Will, that she had a Brother, *William*: another Brother *Anthony*, her Heir at Law, a Sister *Sarah*, and an Aunt, to whom she gives an Annuity; and I point this out to shew, what was the State of her Family at the Time of making her Will: they were the principal Objects of her Bounty, independent of the Devisees of her real Estate. The Circumstance, that she gives the Character of Cousin to the Devisees, is only one Circumstance, from which an Inference is to be drawn, more or less, as to the Intention, according to the other Context; and, as in the Case of *Coningham* v. *Mellish* (a) that was held a Circumstance to be attended to, with reference to this also, that the Heir at Law was in the same Degree of Relation, so

(a) Pre. Ch. 31.

here

1813.

KING v. DENISON.

here there is not one Person, to whom the Testatrix gives any Thing, not a single Legatee, whose Relation to her she does not describe; and this Word "Cousin" is applied in a Will, in which other Persons, standing in a nearer Degree of Relation to the Testatrix, viz. Brothers and a Sister, are mentioned.

The Intention certainly appears singular to give the Character of Trustee, and that merely, to Two young Ladies; the one a married Woman, the other an Infant, of the Age of Fifteen or Seventeen Years: Two Persons, under Circumstances so little adapted to such an Office but with reference to that what was intimated by Mr. *Hargrave* must be taken into Consideration; that, if there is any Trust in this Will, the Testatrix has made them Trustees; and upon the Passage, cited from Lord *Hardwicke's* Judgment (*a*), the same Observation had occurred to me; that though the Appointment of an Infant as Trustee is very singular, it was actually made. The Observation therefore, applied to this Part of the Will, does not deny, that these Circumstances are to be attended to: but, if upon the whole Context these Persons are Trustees, I am not to say, they cannot be so, on the Ground, that one is a married Woman, and the other an Infant. Another singular Circumstance is, that one of them is the Wife of one of the Executors; and the Testatrix has vested the Trust of the personal Estate, not in her, or the Infant, but in Three Gentlemen particularly named. Her Preference of these Persons, giving to her Brothers, her Sister, and their Children, including her Heir, through a double Generation these Interests expressly for Life, all these Singularities are answered by the Fact, that she has made this Disposition.

(*a*) 2 *Ves.* 30.

1813.
KING
v.
DENISON.

Stopping at this Part of the Will, where the Testatrix has devised all her real Estates whatsoever to these Two Persons and their Heirs, subject to and chargeable with the Annuities after mentioned, it is impossible to say, this is within those Cases, laying down the Principles I have stated, a Devise for the particular Purpose of paying the Annuities. It is a Devise in Law for the Purpose of giving the Estate; but with an ulterior Purpose, that the Devisees should take subject to the Annuities; and in a Sense it would have been a Gift upon a Trust. There is a great Difference here between a Devise upon Trust and a Devise subject to a Charge; but the Object is effected much in the same Way; compelling the Party to make good the Charge, or Trust, by very similar Operations, as applied in this Court.

Distinction between a direct Trust and a Charge; though enforced in Equity much in the same Way

The Question, how far these Annuities, as they are created legal Annuities, are equitable, or any of them, must be determined upon the same Principle as applied to all, except one, given to the separate Use of a married Woman: but, suppose the Expression to be, "subject to the Annuities after mentioned, in which I mean, "that none of the Annuitants shall have a legal Interest:" or, "that all should have a legal Interest, except one; and that one shall have an equitable Interest." That surely would not create a Trust within those Decisions, that an Estate, given so subject and chargeable, is to be considered, as given for a particular Purpose: but it would be for the Purpose of giving the Estate subject to Annuities; of which; if legal, Payment is to be enforced in one Way; and, if equitable, in another.

With regard to the Annuity for the separate Use of the married Woman, it is not necessary to determine the Effect of the Case *(a)* before Lord *Kenyon*, considering

(a) Harton v *Harton*, 7 Term Rep. 652.

the

1813. King v. Denison.

the legal Estate, the whole legal Fee, as being in the Trustees, and no Estate in the First and other Sons; and not as it was to support merely the first Devise to the separate Use of the married Woman first mentioned, but as there were other Devises to the separate Use of others in subsequent Limitations, where there was no Devise of the Estate itself: my Opinion with reference to that being, that, if I am right, I am right taking it as an equitable Annuity; and, if wrong, I am wrong, whether it is an equitable Annuity, or not.

If this is so as to the real Estate, the Argument is, I admit, extremely fair as to the personal. The Testatrix, giving a great Variety of Legacies, always mentions the Relation of the Legatee, and, among others, having given to these Three Gentlemen her personal Estate subject to the Legacies, she gives to each of them £200. It is said, that, being Trustees of the personal Estate given to them subject to and chargeable with the Legacies, they ought to be considered as Trustees of the real Estate; and the Words "subject and chargeable," in the former Part of the Will, are to be construed by the same Exposition as in the subsequent Passage, where those Words are used. It was contended on the other Hand, that they are not Trustees of the personal Estate; and there is in the several Cases a strong Doubt upon it.

Executor with a Legacy, or Executors having equal Le- ..es, Trustees for the next of Kin of the Residue undisposed of; as, having Part given, they cannot be intended to take the Whole.

The Ground, upon which an Executor, with a Legacy, or Executors having equal Legacies, are Trustees of the Residue, is, that you shall not intend, that a Person, having a Part given to him, is to take the Whole (a).

(a) See the last Case on that Subject, Langham v. *Sanford*, 17 *Ves.* 435, and the References,

1813.

King
v
Denison.

That is the settled Law; and it would be vain and improper now to question the Propriety of such a Determination: but the Principle, upon which this Doctrine has been introduced, that an Executor having a Legacy, is a Trustee, has given so little Satisfaction, that Case upon Case has occurred, paring down the Application of that Doctrine; until it is not easy to say, upon what Foundation it stands; and this is as good a Reason against the Argument from equal Legacies, that they shall be Trustees as most of the Reasons on the other Side, that the Object might be to give them a Right to come in with the others; to insure them something in case of a Deficiency to answer all.

The Court however has not said so; and I will consider this Case upon the Assumption, that these Persons were Trustees of the Residue of the personal Estate: but does it follow, that the Words "subject and chargeable," are to have the same Construction in both Parts of the Will? That is not a Consequence. I cannot infer from the Construction, which the Testatrix, giving these Legacies, has put upon those Words, so much as to deny them as to the real Estate their ordinary Construction, if there are no Expressions applying to the Devise of the real Estate, equivalent in their Effect to pare down the ordinary Meaning of those Words; and the Construction must be the same, as if she had said expressly, that the personal Estate was to be subject to and chargeable with the Legacies; that she did not mean her Executors to take; but that as to the personal Estate they were to be Trustees; making no such Declaration as to the real Estate

Presumption against intending an Infant to be a Trustee.

Taking Notice of that Class of Cases, that it is difficult to consider an Infant as intended to be a Trustee, and another Class, that an Heir; taking a Benefit by the Will,

No resulting Trust for an Heir, taking a Benefit by the Will: but subject to Circumstances.

cannot

cannot have a resulting Trust, I agree, all these Cases depend on their particular Circumstances; which are to be attended to; but not to have too much Weight. The Ground of my Judgment is this: If this is a Devise for a particular Purpose only, and the Application does not exhaust the Whole, there is a Trust for the Heir, and whether the Testatrix has said so, or not: the Heir, standing in this Situation; that he is entitled to what is not in Law or equity given to another. On the other Hand, this being a Devise of the real Estate, subject to and chargeable with the Annuities, and the Interest for Life in the Rents and Profits in *Anthony* and *Sarah Isaacson* and their Child and Children, and taking it to be a Devise, not for those particular Purposes only, but of the beneficial Interest, subject to a Devise, legal or equitable, with reference to those Annuities, this is not a Case of resulting Trust for the Heir; and upon the whole the Testatrix did not mean to give these Estates for these Purposes only; but did mean to give them, deducting all the Value of the Annuities, expressly given, and the surplus Rents and Profits for the Life or Lives, for which they are given.

Having looked very attentively at the Will, and at all the Cases; and, being satisfied, that no farther Consideration will enable me so to assist my own Mind as to produce a Change of the Opinion I have formed, I think it better not to delay the Judgment of this Case.

The Motion was refused; and the Demurrer allowed.

1813. Feb. 5, 6. 8. 12.

DE TASTET, CARROLL, and ROBARTS, *Ex parte* (a).

No Jurisdiction in Bankruptcy to reject a Debt on the Ground, that it must command the Choice of Assignees, and the Creditor has an adverse Interest to the general Creditors by Property and Security obtained from the Bankrupt immediately before the Bankruptcy: but an unjust Use of his legal Right by choosing himself will be controuled by the Lord *Chancellor* either by removing him, if the Election is recent, and nothing done under it, or otherwise by some Arrangement, as in this Instance, from the great Amount of the Debt, appointing another Assignee to act solely in the Investigation and Decision of the disputed Claim.

Application to the *Lord Chancellor* in Bankruptcy before the Decision of the Commissioners to receive or reject Proof of a Debt, with the View to the Choice of Assignees, improper.

Distinction as to Securities held by a Creditor, seeking to prove in Bankruptcy between Bills and Property of uncertain Value: the former, being ascertained on the Face of them, taken at the full Amount, and deducted.

JOSEPH Parry having absconded under a Charge of Forgery, a Commission of Bankruptcy issued against him and *Thomas Davenport Latham*, his Partner in the Business of Wine and Spirit Merchants; who had also committed an Act of Bankruptcy; but was in no Degree implicated in the Charge of Forgery.

At the first public Meeting under the Commission the Petitioner *Firmin De Tastet* offered to prove a very large Debt upon Three distinct Accounts: the Two first upon Discounts; each to the Amount of above £3000; and the third, exceeding £80,000, upon a general Balance of Accounts. This Proof was resisted by the petitioning Creditor on the Ground, that between *Thursday* the 14th of *January*, when the Forgeries were discovered, and *Sunday* the 17th, when *Parry* absconded,

(a) 1 *Rose*'s Bank. Cases, 324.

De

1813.
DE TASTET, CARROLL, and ROBARTS, *Ex parte.*

De Tastet had obtained from him in Bills and Goods Property to the Amount of £60,000; which *De Tastet* claimed to hold as his own, or as a Security: giving Credit accordingly in the Account, the Balance of which he proposed to prove.

De Tastet, being examined before the Commissioners admitted, that after the Acknowledgment of the Forgery in his Presence by *Parry* on *Thursday*, the 14th of *January* the Bills were drawn and indorsed, and 1576 Puncheons of Rum and other Property transferred; insisting, that the Rum, &c., was agreed to be given up to him as his Property, as already belonging to him, and bought and paid for with his Money.

The Examination of the Petitioner *De Tastet* not being closed, and a farther Investigation of his Debt by the Examination of other Persons being proposed, the Commissioners could not at that Meeting come to a Determination either to admit or reject the Debt; conceiving also, that the usual Caution in admitting a considerable Debt at the first Meeting was the more proper under the peculiar Circumstances, excluding all Means of Information as to what passed between the Creditor and the Bankrupt, and led to such large Transfers of Property immediately before the Bankruptcy, and under an absolute Necessity of absconding.

On the Day previous to the second Meeting *De Tastet* by an Application to the *Lord Chancellor* without Notice, suggesting merely, that he was prevented from proving his Debt, and offering to deduct the Value of the disputed Property, to be ascertained by the Commissioners, and to prove the Residue, obtained an Order for that Purpose on the Terms of giving Security for the Property retained,

1813.
De Tastet, Carroll, and Robarts, *Ex parte.*

retained, if the Commissioners should determine, that he was not entitled to retain it, and he should not reverse their Decision. The next Morning, before the Meeting took place, a Petition to discharge that Order was brought on.

Mr. *Leach*, and Mr. *Montague*, in support of the Petition to discharge that Order, contended, that it was made upon an unfounded Suggestion, that the Debt was rejected, and upon an Application *Ex parte*, without Notice, and was contrary to all Authority; as, this Creditor under the Circumstances, disclosed by the Petition, having obtained Property from the Bankrupt with Knowledge of the Forgery, must be held strictly to the general Rule, that a Creditor, before he is permitted to prove, must give up his Security. if therefore he had availed himself of this Order to choose himself Assignee, he would of course have been immediately removed; having an Interest against the other Creditors inconsistent with the Duties that Office would impose upon him.

Sir *Samuel Romilly*, Mr. *Bell*, and Mr. *Shadwell*, for *De Tastet*.

This is regular. There was no Person, on whom Notice could be served: no Debts having been proved; not even the petitioning Creditor's Debt. The Property, delivered to *De Tastet*, was his own: subject only to the Objection under the Statute of *James(a)*, as having been in the Bankrupt's Possession. *De Tastet* desires to prove a Debt not disputed; offering the most unobjectionable Security, or even to deposit the Goods to await the Event. He proposes to prove, not his whole Debt, but the least Sum, to which he can possibly be entitled.

(a) Stat. 21 *Jam.* I. c. 19. s. 10, 11.

The

The Question is not, whether *De Tastet* shall himself be the Assignee, but whether he, upon whom, as having from the Amount of his Debt the greatest Interest, the Statute has thrown the Protection of the Estate by the Choice of Assignees, shall vote in that Choice. It is supposed, that he means to choose himself: but it is not to be assumed, that he will exercise unjustly the Power, vested in him by the Law. The late Case of *Ogilvie* (*a*) shews, that Persons may prove, though they have an Interest adverse in some Degree to that of the general Creditors.

Mr. *Leach*, in Reply.

The Discharge of this Order cannot affect any Right of *De Tastet*, except that of voting in the Choice of Assignees; which under the peculiar Circumstances of this Case, claiming adversely to the other Creditors no less a Sum than £60,000, he cannot exercise with Safety to their Interests. In the Case of *Ogilvie* the Assignees were not removed: but another was appointed to act between them and the general Body of the Creditors upon this special Ground, that the original Assignees, having acted for Two Years, had acquired a Knowledge of the Affairs of the Bankruptcy, that made it beneficial to the Creditors, that they should be continued.

The Lord CHANCELLOR.

The Order I made Yesterday was certainly without Precedent; and I must do Justice to the Officer (*b*), who

(*a*) In the Bankruptcy of *Ross* and *Ogilvie*.

(*b*) The Register was in Court: not the Secretary of Bankrupts.

sat

1813. De Tastet, Carroll, and Robarts, *Ex-parte.*

sat below me, by stating, that he suggested, that Notice ought to be given. I then thought, and still think, otherwise; but the Judgment of the Commissioners as to receiving or rejecting the Proof, either wholly or partially, should be first taken; and a Creditor has no Right to come here for a previous Direction to them. They ought to exercise their own Judgment; which, if wrong, may be rectified by an Application here. It is true, an Assignee will be removed, or the Inconvenience resulting from the Choice corrected, under given Circumstances: but I repeat, that it is a great Evil to apply before the Choice of Assignees for a Direction to the Commissioners, as to what Debts they should receive or reject; and, therefore, this Order must be discharged.

Let *De Tastet* go before the Commissioners, and offer such Proof, and upon such Terms, as he may be advised; and let the Choice of Assignees be postponed to *Wednesday*, with Liberty to both Parties to make any Application in the mean Time.

Under this Order *De Tastet* again tendered the Proof; proposing to give Security for the disputed Property, or even to deposit it subject to his Claim; but refusing to deliver it up absolutely.

The Proof being rejected was brought before the *Lord Chancellor* by a Petition, complaining of that Decision, &c. and praying an Order, that the Proof shall be admitted.

Feb. 8. Sir *Samuel Romilly*, Mr. *Bell*, and Mr. *Shadwell*, in support of the Petition.

The

The Commissioners adopted a similar Course in the Case of *Amhurst*; and Assignees having been chosen, your Lordship set aside the Choice. If as it is alledged, this is the Practice of Commissioners, it requires Correction. This Proof was rejected, not upon any Doubt as to the Debt, but on the Presumption, that the Petitioner, if permitted to prove, and vote in the choice of Assignees, would certainly choose himself sole Assignee; and then there would be no Means left of agitating the Question as to his Right to retain the specific Property in dispute. If by Law he is entitled to be Assignee, your Lordship cannot deprive him of that Right; though you will prevent any Abuse of his Power.

Mr. *Leach*, and Mr. *Montague*, for the petitioning Creditor.

The Commissioners not only acted right in rejecting the Proof, but they had no Power to receive it. The Rule, established by invariable Practice, is, that a Creditor holding a Security is not permitted to prove, until by a Sale *(a)* of the Security the Extent of his Debt is ascertained; 2dly, that a Creditor having obtained Property of the Bankrupt after or on the Eve of an Act of Bankruptcy, cannot prove, until he has delivered up that Property. No one can doubt, that the Object of this Petitioner is to consult his own Interest by choosing himself sole Assignee, or perhaps joining some particular Friend. The Question therefore is, independent of the Objection, that until a Sale of the Securities the Amount of the Debt cannot be liquidated, whether the Commissioners ought to have received a Proof, seeing, that it must

(a) A Valuation is sufficient: *Ex parte Nunn*, 1 *Rose's* Bank. Cas. 322.

1813. DE TASTET, CARROLL, and ROBARTS, *Ex parte.*

must command the Choice of Assignees, and aware of the Purpose, to which it was to be applied, to serve the Interest of this individual Creditor against the general Interest of all the other Creditors; whether the Commissioners should do To-day what your Lordship will order them To-morrow to undo; as your Lordship would certainly remove an Assignee, chosen under such Circumstances. The Cases of *Ramsbottom* and *Homer* are recent Instances. The Inconvenience of such an Appointment is obvious. It cannot be supposed, that as Assignee he would be inclined to institute against himself Proceedings, which the Interests of the general Creditors demand; and though that might be provided for, he may from the intermediate Possession of the Proceedings, with all the Papers, containing the Evidence against him, acquire an Advantage, which no subsequent Arrangement could remedy. The Offer to deposit the disputed Property, which however does not extend to the Bills, or otherwise to secure it, is immaterial. The Object is not Security, but that this Creditor shall not avail himself of the Amount of his Debt to prevent a fair Trial of the Question, which his Conduct with full Knowlege of the Forgery has raised.

Sir *Samuel Romilly*, in Reply.

Even your Lordship has no power to do that, which the Commissioners have done. The Question simply is, whether a Creditor has not a Right to prove his Debt, which is not disputed, or whether that Right is to be taken from him on a mere Presumption, that he will subsequently abuse the Power he would by proving acquire under the Statute; which must have contemplated the Case of conflicting Interests, yet has prescribed the positive Rule, that the Amount of the Debts, not the Number of Creditors, shall decide the Choice of Assignees. The Present Consideration

1813.

De Tastet, Carroll, and Roiarts, *Ex parte.*

sideration is not, whether your Lordship would remove *De Tastet*, if chosen Assignee, but whether he is, or is not, to be allowed to vote in the Choice of Assignees. No Instance can be produced of interfering to prevent that; or of exacting a Stipulation, that he shall, if allowed to prove, vote in any particular Way. This is not an Application to your Lordship's Indulgence. The Petitioner stands here insisting on his Right; as it is admitted, that he is a Creditor of the Amount, to which he submitts to restrain his Proof. The Question, whether your Lordship would remove the Petitioner, if chosen Assignee, must depend upon Circumstances, which are not to be prejudged.

The Lord Chancellor.

I was not aware, that another Petition had been presented, that this Petitioner might be permitted to prove his Debt upon Terms: or I should have looked to some Cases, which I think bear upon this. I will not however on that Account delay the Opinion I have formed on Principle.

I referred this Case back to the Commissioners for more Reasons than One: First, that it was stated to me, that the Commissioners had not determined, whether the Proof should be admitted, or not; in which Case it ought not to have been brought before me: for another more important Reason; that, it being stated, that the Proof had been rejected upon an habitual Practice, founded upon a Power in the due Exercise of a Discretion to reject a Proof under such Circumstances, I wished the Commissioners to consider, how that really stood. It seemed to me an extremely disputable Principle in a Court of Justice, that a Man shall not vote in the Choice of Assignees, because, if chosen Assignee, I should remove him; that it is assuming.

1812.

De Tastet, Carroll, and Robarts, *Ex parte.*

suming, that he would exercise that Right for the Purpose of choosing himself.

With regard to the Power of the *Lord Chancellor* to remove an Assignee afterwards, if he has an Interest adverse to the other Creditors, it is too late now to dispute that Power, which has been constantly exercised; and it is usually stated from the Bar, as raising a *primâ facie* Case for Removal, that nothing has been done by the Assignee since his Election; and that he has a material adverse Interest. The Court has in many Cases modified that Rule; assuming that to be the Rule. If the Assignee has been permitted to act, if Sales have been made, and Transactions of Importance have taken place since his Election, the Rule has been modified by limiting the Exercise of his Powers in that Character, and giving Powers to others, who had no adverse Interest; to prevent the Mischief, that would arise from having an Assignee with an Interest adverse to the other Creditors. Accordingly, in a very late Case, One of Two Assignees having an adverse Interest, I directed an Action to be brought by the other Assignee against him; and that he should admit the Plaintiff to be the sole Assignee.

Modification of the Rule, that an Assignee with an Interest adverse to the other Creditors may be removed, by limiting and controuling his Powers, where Sales or other important Transactions have taken place. In such a Case, One Assignee ordered to bring an Action against the other, admitting the Plaintiff to be sole Assignee.

This Case is therefore to be considered, first, with reference to the adverse Claim of this Petitioner; and, secondly, as to his Interest in the Bills. As to his adverse Claim, whether he is to be chosen, not by himself but by other Creditors, either sole Assignee, or a joint Assignee, I am not now to determine, whether I am to remove him. It is enough to say, this Case furnishes a strong adverse Interest; supplying a Question very likely to be tried between this Petitioner and the general Creditors; and it may in that View be very probable, that, if chosen sole Assignee, he will not be permitted to remain so: but that Question I cannot determine, until it is brought

before

1813.
DE TASTET, CARROLL, and ROBARTS. *Ex parte.*

before me distinctly with all the Circumstances: and it would not be just to this Petitioner to assume, that he will choose himself, if this is a Case, in which he ought not to be Assignee. If he should do so, an Application may be made, and will be decided, without Delay; as it ought to be; for, if, before an Assignee has acted, a clear, valuable, adverse, Interest appears, his Removal is almost of course. So, the Court has said, that a Person with a clear, valuable, adverse, Interest shall not vote in the Choice of Assignees; but has never *a priori* restrained him from voting; and it would be too hasty to restrain him from voting for an unobjectionable Person. His adverse Claim therefore is not a Circumstance, which ought to prevent his proving his Debt; but will be a Circumstance extremely material to be considered, if after the Proof it should appear, that a Use was made of it, which would not be permitted: but I will not anticipate that.

As to the Security, it is clear, that the Proof is to be for so much as remains, after as much has been made of the Security as can be; and the Reason of not admitting the Proof in such Cases is, that the Amount of the Debt is not ascertained: but that does not apply to Bills; which are not like an Estate, that may produce more, or less; of which no Estimate can give the true Value: but, if the Holder of Bills will take them at the Amount, which upon the Paper they import to secure, they may be worth less, but cannot be worth more; and, deducting the Amount, he is in the Situation of any other Creditor.

Upon the whole, presuming to say nothing as to what will be done under the Circumstances, except that, if there should be a Necessity for a future Application, and it should appear, that the Petitioner has an adverse Interest, founded on a serious Question of Law, applied to Facts,

1813. De Tastet, Carroll, and Robarts, *Ex parte.*

his Election as Assignee will be a hopeless Project, but not anticipating that, I think, he has a Right to prove upon the Terms proposed. I do not say, the Commissioners have done wrong; as there is a great Difference between what they can do and what the *Chancellor* can do but my Opinion goes this length, that I do not think I have the Power to prevent his proving, because there may be a Use made of the Proof, which would not be permitted.

Therefore let him prove upon the Terms proposed. He must for the present deduct the Amount of the Bills certainly.

Feb. 12. *De Tastet*, having proved his Debt under that Order, and *Sotilla*, a Creditor for £10,000, were chosen Assignees; and a Petition was presented, praying the Removal of *De Tastet.*

Mr. *Leach*, and Mr. *Montague*, in support of the Petition.

The Result is just what was foreseen: an Appointment of Assignees, upon which your Lordship's Interference is indispensible. One is *De Tastet* himself: having an Interest decidedly adverse to the other Creditors in the important Question upon his Right to retain Property, obtained under such Circumstances:* the other is a *Spaniard*, unacquainted with the *English* Language, the intimate Friend of *De Tastet*, and under his Influence. The late Case of *Ramsbottom* is decisive, that an Assignee, who insists on holding Property against the general Creditors, shall be removed. These Assignees not having acted, there can be no Objection to their Removal.

Sir

1813.

DE TASTET, CARROLL, and ROBARTS. *Ex parte.*

Sir *Samuel Romilly*, Mr. *Bell*, and Mr. *Shadwell*, for the Assignees suggested, that the Question might be tried without removing *De Tastet*, by appointing another Assignee for the particular Purpose of investigating his Claim to retain the Property in Dispute.

The Lord CHANCELLOR.

With regard to *Sotilla* it is unnecessary to say any Thing: the Petition not praying his Removal, I can make no Order with respect to him. As to *De Tastet* I feel very much the Circumstance, that he must now be a Creditor for £86,000; and may be so for a great deal more; and, if I could be quite sure, that I foresaw sufficiently to provide by any Modification of the general Rule, so as to secure the Interest of all the Creditors, I should be glad to take such a Course. It strikes me, that this may be attained by appointing One of these Petitioners a Co-assignee; the Person so appointed to be the only one to act in the Investigation of *De Tastet's* Demand; and, if no more Objection can be stated, I will make that Order; directing, that such Person shall be considered as the sole Assignee in the Investigation of this Demand, and shall be at Liberty to bring such Actions and Suits as may be adviseable; taking Care, that the Title of *De Tastet*, as Assignee, shall not be set up against them. As to the Costs of this Application, it is of course to give them out of the Fund. The Costs of the subsequent Proceedings must depend upon their Issue.

Mr. *Montague* objected, that Inquiries previous to the Trial would be necessary, and Difficulties would be thrown in the Way of the new Assignee by the others. The Order was however Made according to the *Lord Chancellor's* Suggestion.

1812.
LINCOLN'S INN HALL.
Dec. 11, 12.

BALL *v.* COUTTS.

Punishment for Contempt by marrying a Ward of Court by Commitment, or in a flagrant Case by directing a criminal Prosecution for Conspiracy, &c., the Subject of sound Discretion; and though the Right to interpose, without Complaint is not affected by Time, the Exercise of it was dispensed with upon Circumstances; no Complaint made for Eight Years; the Husband, though his Conduct would have justified Punishment on a recent Application, not being a needy Adventurer, but of equal Family and Fortune; having actually made a considerable Settlement; under which the Children had vested Interests; and alledging Misconduct by the Wife. The Interests of the Children not to be affected: but the Settlement varied as between the Husband and Wife by increasing the Pin-money, giving her some Interest in future Property, &c.

Pin-money subject to the Property Tax; not to a Deduction for Alimony; as it is clear of Maintenance.

THE Master's Report stated the Marriage on the 9th of *July*, 1804, of *Francis Lee* and *Catherine Ball* by Banns: *Francis Lee* being then in the Thirty-sixth Year of his Age, and *Catherine Ball* in her Seventeenth Year; that the Marriage was had without the Consent of *Sarah* the Wife of *Thomas Johnson*, the Mother of *Catherine*, appointed by the Court Guardian of her Person; and after a Proposal by *Lee* in the *February* preceding through the Mother and Guardian had been rejected both by the Mother and the Daughter.

Catherine Ball being entitled to considerable personal Property in the Event, that she should live to attain the Age of Twenty five Years, by Indentures of Lease and Release, dated the 15th and 16th of *July*, 1805, *Francis Lee* in consideration of the Fortune of *Catherine Ball* conveyed Estates at *Calcutta* in the *East Indies* and Estates in the County of *Lancaster* and other Leasehold Property and Funds, to Trustees; upon Trust to sell and to stand possessed of £10,000, £3 *per Cent.* consolidated Bank Annuities, therein mentioned to have been transferred by *Francis Lee* to them, and the Monies to arise from the Sale of such Estates, upon Trust to pay £300 a

Year

Year to the Wife for her separate Use for Pin-money during the joint Lives of herself and her Husband, and the Residue to the Husband; in case of her surviving him to pay her £500 a Year, and the whole yearly Proceeds to him, if he should survive her: and as to the Principal in Trust for the Children of the Marriage after the Deaths of the Parents, equally, with Survivorship, subject to the joint Appointment of the Parents, or in Default thereof to the Appointment of the Mother surviving.

On the 11th of *April*, 1806, Mrs. *Lee* was delivered of a Son, and on the 4th of *August*, 1810, of a Daughter. Mr. *Lee* having instituted a Suit in the Ecclesiastical Court against his Wife for Adultery, on the 4th of *December*, 1811, a Sentence of Divorce and Separation *a Mensâ et Thoro* was pronounced.

The Master's Report stated, that the Sum of £300 a Year, allowed by the Settlement for the separate Use of *Catherine Lee*, was not at the Time a sufficient Provision for her, considering her Fortune; and that £600 a Year ought to have been allowed; submitting, whether after the Divorce it ought to be encreased; but in most other Respects approving the Settlement. Mrs. *Lee* objected to the Report; insisting, that, as she was at the Time of her Marriage a Ward of the Court, and Mr. *Lee* married her in a clandestine Manner without the Consent or Knowledge of the Court, the Master ought to have stated, that the Settlement was not proper; and that her whole Fortune in Possession and Expectancy ought to have been secured for her and her Issue, according to the Case of *Millet* v. *Rowse* (a). The Master having over-ruled the Objection, a Petition was presented by Mrs. *Lee*, that he may be directed to review his Report; that the Settlement may be

(a) 7 *Ves.* 419.

1812. BALL v. COUTTS.

declared not a proper Settlement; and that the whole of her Fortune may be settled on her and her Issue; and in addition to the Circumstances before stated alledging her Age at the Time of the Marriage; that the Banns had been twice published, before she was made acquainted with it: that Mr. *Lee* in his Letters directed her, if the Clergyman should inquire her Age, to say she was Twenty-four; and stating cruel Usage and Desertion on the Part of her Husband, and that she had received nothing from him for the last Three Years.

Another Petition was presented by Mr. *Lee*, praying a Declaration, that the Settlement was proper, and a Transfer to him of his Wife's Property; stating, that in marrying without Consent of the Court he had acted, though unadvisedly, from Motives of Affection and Regard to his Wife; that he considered himself equal in Family and Fortune to her; that the Settlement was prepared and approved by her Friends and Counsel; that he had uniformly treated her with Kindness and Affection; and by his Indulgence had incurred great pecuniary Embarrassment, not having yet received any Part of her Fortune; that he was deceived as to her Age; believing it to be as stated both from her own Representation, and her general Appearance; also contending, that, as the infant Son took a vested Interest, the Settlement could not be altered.

Sir *Arthur Piggott*, and Mr. *Hart*, in support of Mrs. *Lee*'s Petition, contended, that under the Circumstances of this Case the whole of the Wife's Fortune ought to be settled to her separate Use, and upon her Issue; excluding the Husband from any Participation in it; referring to *Stevens* v. *Savage* (a), *Like* v. *Beresford* (b), *Winch* v.

(a) 1 *Ves.* 154. (b) 3 *Ves.* 506.

Jones

Jones (a), *Chassaing* v. *Parsonage* (b), *Wells* v. *Price* (c), *Millet* v. *Rowse* (d), *Bathurst* v. *Murray* (e), *Halsey* v. *Halsey* (f), and *Pearce* v. *Crutchfield* (g).

Mr. *Richards*, for the Trustees.

Sir *Samuel Romilly*, and Mr. *Bell*, in support of Mr. *Lee*'s Petition.

The Cases cited are Instances of the Seduction of young and inexperienced Women, stolen from the Protection of their Friends by desperate and needy Adventurers. This is a Case of a perfectly different Character: a Marriage of a Ward of the Court, certainly without Consent, and therefore not to be justified; but the Husband a Gentleman of Family and Fortune; who actually settled £1000 a Year: a Connection which this Court would have approved, had an Application been made for its Sanction. The Court has not in this Instance the Means of compelling a Settlement; as in most of the Cases referred to; where the Parties were committed; and the Execution of a Settlement was made the Condition of their Release. This cannot be compared to the Case of a Settlement merely voluntary, the whole property belonging to the Wife; as in *Wells* v. *Price* (h), and *Halsey* v. *Halsey* (i): nor to *Like* v. *Beresford* (k); an Attempt by Creditors of the Husband to interpose for the Purpose of taking from the Court the Power of making a proper Settlement; which the Court would not allow.

(a) 4 *Ves.* 386.
(b) 5 *Ves.* 15.
(c) 5 *Ves.* 389.
(d) 7 *Ves.* 419.
(e) 8 *Ves.* 74.
(f) 9 *Ves.* 471.
(g) 16 *Ves.* 48.
(h) 5 *Ves.* 398.
(i) 9 *Ves.* 471.
(k) 3 *Ves.* 506.

1813.

BALL v. COUTTS.

Sir *Arthur Piggott*, in Reply.

Admitting this Settlement to be in itself not materially improper, it must be looked at as connected with the Circumstances. This is not the Case of a young Man led away by the Violence of his Passions: but this Conduct, had the Court been made acquainted with it at a more early Period, must have been the Subject of Inquiry elsewhere. No Rule is better settled than that a Man, who has conducted himself in this Manner, shall derive no Advantage from his Wife's Property. The Court must discourage such Conduct by with-holding that Property, which is its Object. This Settlement is voluntary so far as the Wife is concerned; being made after Marriage, and not in consequence of any Agreement before Marriage; nor could the Child claim against the Equity of the Wife. The Case of *Like* v. *Beresford* (*a*) has no such Circumstances as these: the Assignment was made for valuable Consideration before the Decree: yet the Court even in that favourable Case would not let in a Claim by Assignment from a Husband, who had married under such Circumstances.

The Lord CHANCELLOR.

Dec. 12.

I feel very strongly the Propriety of the Expectation, which has been expressed, that I shall look into the Documents of this most important Case; and with extreme Apprehension, that in the Course of hearing such a Case Considerations, arising out of imputed Immorality, may have more effect, than they should have, upon a judicial Determination of what I ought to do, I shall take some Time, with the View to protect myself from that Danger.

(*a*) 3 *Ves.* 506.

With

With regard to the Divorce, whatever the Legislature may do upon the Fact of Adultery, I am bound to consider these Parties as Man and Wife; as having One Child by the Admission of both, and, according to the Theory of the Law, Two Children, of that Marriage. I am not therefore to consider their Separation as a Dissolution of the Marriage.

In sending this Case to the Master, though a Case of Contempt, I illustrated the Principle, upon which I have uniformly acted; that what the Court will do upon the Head of Contempt must be the Subject of its sound Discretion. Of the peculiar Circumstances, now brought forward on both Sides, I knew nothing. It is not at present my Intention to say more than this; that, if it was intended at the Bar to dispute the Right of the Court to take Notice at any Time of a Contempt, committed by marrying a Ward of the Court, I do not agree, that Time will affect the Right of the Court to interpose. On the other Hand I have no Doubt, that, as the Jurisdiction upon this Head must be exercised according to a sound Discretion, in Cases of that Sort, especially in such a Case as this, many Circumstances must be considered, before the Court determines, what is to be done.

I have no Difficulty in stating upon these Affidavits, that, if the Case had been brought forward immediately after the Marriage, however painful the Duty of interfering in this Branch of the Jurisdiction, inflicting personal Sufferings upon Parties, I could not have with-held the Application of that Jurisdiction; unless I had taken another Course; and I take it to be entirely competent to this Court, as I have illustrated in my Practice, not to confine itself to Commitment for a Contempt, but in a Case, calling for severer Punishment, to direct Prosecutions, of

various

1812.

BALL v. COUTTS.

Immorality, as such, not punished in Equity; but considered in punishing Contempt.

various Kinds: in some Instances for a Conspiracy, in others, as in the Case of *Millet* v. *Rowse* (a), for an Offence of another Description: not that this Court is to punish Immorality, as such: but, if it discovers, as in that Case, gross Immorality in Circumstances, forming a Contempt, the Court has always been in the Habit of attending to such Circumstances. When that Case occurred, I was Attorney-General; and Lord *Loughborough* directed me to look into the Circumstances, and prosecute. We had a Difficulty in prosecuting for Perjury; that the Statute does not give the Power of administering an Oath: but I found Authority enough for indicting. It was not for Immorality that the Prosecution was directed; but for an Act done in the Course of committing a Contempt of this Court; and *Thompson* was convicted; and suffered the Pillory.

I do not mean to represent this to be such a Case as that: but, if this Case had been immediately brought forward, I should have thought the only Notice to be taken of it was by Commitment. I cast no Reflection upon any of the Gentlemen, who were consulted professionally, for not bringing it before me. It is much too delicate a Subject for Blame, that they did not expose Persons, consulting them professionally; and though some Gentlemen would have refused to be concerned, that is too much to expect from a professional Man. It is too much even to suppose, that he has a Right to say so. No Blame therefore attaches to the Fact, that the Court did not sooner hear of these Matters.

The Court however has now heard of them; and I do not agree, that there must be a Complaint. The Court, if informed of such a Transaction, has a Right, and may

(a) 7 *Ves.* 419.

under

1812.

BALL
v.
COUTTS.

under Circumstances be bound, to take Notice of it; and the Fact, that there was no Complaint, if it stood alone, must have Weight in the Question, whether the Court is to interfere. This Case goes far beyond that. It is evident, that the moral Natures of these Marriages, with Wards of the Court or not, differ as much as Light and Darkness. Some are very flagitious: others venial. I agree, the Marriage of any young Lady against the Consent of her Parents or Family is thus far to be regarded as an Act not to be approved, that it imposes on the Husband an Obligation to make Atonement during his whole Life: but under many Circumstances it is excusable; and it may have arisen from an imprudent exercise of very virtuous Motives. If however a Marriage of that Sort is a Robbery both of the Person and Fortune of the Lady, I say, that in a moral View, though I have nothing to do with that, there are few Crimes more aggravated.

Under whatever Circumstances the Marriage was had, these Parties, it is said, lived together many Years in conjugal Happiness: but after the Birth of One Child, acknowledged by both, and of another, whom for the Purpose of this Settlement I must consider as belonging to them, that Happiness was determined by the Adultery of the Lady; and the Question now is, what I am to do with reference to this Contempt, committed in 1804, disclosed to the Court in 1812, with all the Circumstances occurring in the Interval; and what I am to do in Point of Settlement; not considering, whether it is a voluntary Settlement or not; and if it is, clearly by the Approbation of the Court it will become not voluntary.

The Principle, I admit, is, that the Wife has the same Right to call upon me for a proper Settlement, as if no such Settlement had been made: but I must also consider,

1812. BALL v. COUTTS.

sider, how far the Interests of the Children may be affected; and a farther serious Consideration is, that, if the Court is satisfied, that this Sort of Proceeding has been a Mode of purchasing off the Notice of the Court that Circumstance, when it comes to the Knowledge of the Court, must receive Attention. Sensible of the Importance of this Case, I shall consider it with an Anxiety to guard against permitting any Thing to be mixed with my View of the Circumstances, except what belongs to a judicial Consideration of them.

1813, *Jan.* 13.

The Lord CHANCELLOR.

No Means of enforcing a Settlement on Marriage of an Adult, unless the Husband seeks to obtain her Property in Court: but, if the Marriage is Contempt, the Court, vindicating its Jurisdiction by Imprisonment, compels a Settlement.

When a Lady, having Property in this Court, marries after she is of Age, the Court does what it can to obtain a proper Provision for her: having, as there is no Contempt committed, no Means of enforcing a Settlement, if the Husband does not seek to lay his Hands upon the Property: but, if the Marriage is a Contempt, the Court, vindicating its Jurisdiction, is enabled by Imprisonment to compel the Husband to make a proper Settlement. In this Case the Court was not informed for Eight Years of the Contempt, that was committed; and considering the Case with the View to determine, how far it ought to interpose on that Ground, the Court always has Regard to the subsequent Conduct.

The Scheme of this Settlement, with regard to the Property of the Husband, is to devote the Whole of that settled Property to his Children by this Marriage, without any Reservation for Children by any other Woman, equally, with Survivorship, subject to the joint Appointment of the Parents, or, in Default of a joint Appointment, to the Appointment of the Wife surviving; though the Property was the Husband's. This Settlement, though in

its

its immediate Effect proposing to secure about £1000 a Year on the Part of each, really binds all the Interests, which Mrs. *Lee* might take by the Deaths of any of her Brothers and Sisters, who have a Fortune equal to her's, in Infancy or before Marriage, binding all her Interests, either in actual Expectancy, or that might happen to devolve upon her: the Subject of Settlement on his Part being only a Capital, producing £1000 *per Annum*. There is, I understand, no such Instrument actually in Force, as is suggested to have been executed by her just before the Birth of the first Child, operating as an Execution of the Power over this Fund; the Capital of which therefore is now undisposed of; and if there are no Children having a vested Interest, the Trust is for the Husband, his Executors, &c. There is no Increase even of the Pin-money, no Interest whatsoever to her during his Life in the Produce of Property devolving to her. As to the Legitimacy of the Daughter, which is disputed by Mr. *Lee*, the Court cannot enter into that Question; but must for the present take her to be legitimate.

1813.

BALL
v.
COUTTS.

Both Parties are dissatisfied with the Master's Report. The Petition of Mrs. *Lee* insists, that the Settlement ought to be according to that, which was directed in the Case of *Millet* v. *Rowse* (a); devoting to her separate Use the whole Proceeds of her Fortune in Possession and Expectancy, and providing for her Children by any Husband; grounding this Claim upon what is represented to have been the Doctrine of the Court, as applied to a Person in her Situation, married as she was, a Ward of the Court, the Marriage therefore without Leave being a Contempt by the Husband; and partly also upon Objections urged against the Settlement, as prepared, even if she should not

(a) 7 *Ves.* 419,

be

1813.
BALL
v.
COUTTS.

be entitled upon the Circumstances attending her Marriage.

When that Petition, which communicated the Fact of the Marriage of a Ward of the Court without Leave, and therefore a Contempt committed by the Person so marrying, was first before me, I knew no more than that Fact, that a Contempt was committed in 1804; that it was not mentioned to the Court; that they lived together, as I must take it, in Harmony, until 1812; and then on the Part of the Wife Elopement, Adultery, and a Sentence of Divorce *a Mensâ et Thoro* on that Account, took place; and though I have no Doubt, that, whether the Communication of the Fact, that a Contempt has been committed, comes early or late, the Court has Jurisdiction, and may feel a Duty, to punish that Contempt, yet it would not be a very wholesome Exercise of Discretion to visit that Offence strongly, if upon Attention to Circumstances, that have occurred in the Course of Six, Seven or Eight, Years, not very strongly called upon to vindicate the Jurisdiction; and in these Cases, where it is exercised really for the Benefit of the Party the Court ought to look with great Attention to all the Circumstances of each Case.

Facts have been since disclosed; which are said to be irrelevant; but I cannot agree, that the Manner, in which the Marriage has been contracted, may not call for great Attention in the Formation of the Settlement of the Lady's Fortune. The Circumstances, which have since come to my Knowledge, not only justify, but if the Communication had been recent, would have compelled me to take, very strong Steps in support of the Jurisdiction; and I do not think, I could have been excused, if, besides taking Care of her Fortune, I had not directed a Prosecution for a Conspiracy against these Parties.

The

The Question, now before me, is a very difficult one. First, this is not at this Moment a Case, where the only Interests to be considered are those of the Husband and Wife; as I do not see my Way to any Alteration of this Settlement, which would prejudice the admitted Interest of One Child; and that, which I must at present take to be an existing Interest in the other. This Court could not permit the Husband to do any Act, which would disappoint those Interests. As to the Capital therefore, and the Interests of the Children in that Capital, I have not the Power of making any Alteration; if it was fit to do so.

Another View of this Case is very material. I do not understand the Doctrine of the Court with regard to the Effect of the Marriage of a Ward to be as to her Property precisely as it is represented by Mrs. *Lee*'s Petition. If the Case was such as she states, a Beggar marrying for the Sake of the Fortune, the Court has been in the Habit of not permitting him to touch that Fortune, which was his Object; and in Cases, where there are many good Reasons against so acting, I admit, the Court has generally taken that Course: but it has never gone the Length, that, if this Species of Indiscretion has occurred, which the Court must punish by Commitment, but which brings together Persons of equal Rank and Fortune, and as considerable a Settlement is made by the one as by the other, no Attention is to be given to an equivalent Provision, made by the Husband for the Wife and Issue. That Doctrine has never been stated; and is not consistent with the Principle, on which the Court acts.

Distinction upon Contempt by Marriage of a Ward of Court: a Person of no Property, whose only Object is the Fortune, is not permitted to touch it: and the whole is put in Settlement: otherwise, when the Husband of equal Rank and Fortune makes an equivalent Settlement.

It is very difficult to establish, that I can now hold that Settlement to be improper, which the Court, if its Attention had been called to the Subject, would have approved in 1805; not however meaning to say, that this

Settlement

1813.

BALL v. COUTTS.

Settlement would have been approved: but the Court would not from subsequent Circumstances disapprove a Settlement, which, if called to the Consideration of it immediately after the Marriage, it would have approved. As to the Conduct of this Lady herself, it would require much more Attention, if it was not to be urged in her Favor, that the Transactions, which took place in the Circumstances of her Marriage, might have led her into that Misconduct, which is now made the Subject of Complaint. There is however this Misconduct; and with regard to exercising the Jurisdiction against the Husband by directing a Prosecution now, it comes somewhat too late for that. I am not disposed either at this Day to exercise that Jurisdiction, which the Court usually executes, by Imprisonment; where a Prosecution is not directed; and as to the Interests of the Children, it is not possible to alter them.

The Result is therefore, that I am inclined to alter in some respects, which I will communicate, the Provision as between Mr. and Mrs. *Lee*, the Provision as to her Income, but not to the Extent, in which the Master proposes Alteration, as to her future Expectations, by giving her some Interest in what may come to her in consequence of those Expectations. As to the second Point, the £500 a Year, proposed as Maintenance for the Children of that Marriage, I am not quite determined; having considerable Doubts, whether it is wholesome to place Children out of the Controul of the Parent by giving them an independent Fortune in his Life. With regard to the other Parts of the Case I shall propose some Alterations; and, abstaining now from directing a Prosecution and Imprisonment for the Contempt, I desire, that this may not be drawn into a Precedent, or stated as an Example in any future Case, not consisting of the same Circumstances;

forbearing

1813. BALL v. COUTTS.

forbearing from that upon Attention to the Facts of the Marriage in 1804; that they lived, as appears to me, in Harmony a considerable Time afterwards, and the Circumstances of the Conduct of both since; and with that Observation I part with the Case.

The Lord CHANCELLOR on a subsequent Day said, under all the Circumstances the Pin-Money must be £100 *per Annum*; and that it must be subject to the Property-Tax: but the Alimony should not be deducted; as, if they had lived together, she would have been entitled to Maintenance beyond the Pin-Money.

KNOWLES *v.* BROOME.

1813. LINCOLN'S INN HALL. *Jan.* 15.

THE MASTER OF THE ROLLS, *for* THE LORD CHANCELLOR.

Time enlarged for Appearance to a Bill of Foreclosure under Stat. 5 *Geo.* 2. c. 25.: Notice in the Parish Church having been prevented while under Repair.

UNDER a Bill of Foreclosure, the Defendant absconding, an Order was obtained for the Defendant to appear by a certain Day; a Copy of which was according to the Act *(a)* of Parliament posted up at the *Royal Exchange*, and inserted in the *London Gazette*; but the Parish Church of *Cripplegate*, where the Defendant last resided, being then under Repair, the Plaintiff could not comply with the Direction of the Act, requiring, that a Copy of the Order shall be published in the Parish Church immediately after Divine Service.

(a) Stat. 5 *Geo.* 2. c. 25. s. 1.

 The

1813.
KNOWLES
v.
BROOME.

The Repairs of the Church being completed, the Plaintiff moved, that the Defendant may be ordered to appear to the Bill on or before the 27th of *February* next.

Mr. *Shadwell*, in support of the Motion, mentioned the Case of *Wilkinson* v. *Coker* (a).

The MASTER *of the* ROLLS made the Order on the Authority of that Case.

(a) 1 *Dick.* 74.

1813.
LINCOLN'S INN HALL.
Jan. 15.
Feb. 25.

The Process to obtain a Decree *pro confesso* not applied to a Prisoner in *Newgate* under a Criminal Sentence: who if brought up by *Habeas Corpus* must be remanded immediately; and cannot, as in a Civil Case, be turned over to the *Fleet cum causis*, subject to the farther Process by *Alias Habeas Corpus*, &c.

MOSS v. BROWN.

THE Defendant, confined under Criminal Process, having been brought up from *Newgate* turned over to the *Fleet*, and then carried back to *Newgate* (a), under the Order of this Court, the Plaintiff moved, that he might unless the Defendant should put in his Answer by a Certain Day, be at Liberty to apply for the Clerk in Court to attend with the Record of the Bill, in order to take it *pro confesso*. The *Register* declined drawing up the Order.

Mr. *Shadwell*, for the Motion, relied on *Pendergrast* v. *Sauberque* (b).

(a) *Moss* v. *Brown*, *ante*, 78.

(b) 2 *Dick.* 535.

The

1813.
Moss
v.
Brown.

The Lord Chancellor.

The Case of *Rogers* v. *Kirkpatrick* (a) shews the Difficulty of applying this Process to Criminal Cases: and the Reason is, that the Writ of *Alias Habeas Corpus* cannot issue except to the Prison of the Court. A Defendant, confined in another Prison in a Civil Case, is turned over to the *Fleet cum causis*; and may be brought up repeatedly: but, when brought up from Confinement under a Criminal Sentence, he must be returned immediately: he cannot be kept an Instant (b). The Difficulty, which is not the less material as being an Objection of Form, is, that the Defendant is not in a Place, where the Process of this Court can reach him.

No Order was made (c).

(a) 3 *Ves.* 471. 573.

(b) *Lloyd* v. *Passingham*, 15 *Ves.* 179. In *The Attorney-General* v. *Smith*, 1 *Dick.* 135, the Cause of the Imprisonment does not appear.

(c) As to the Process under the Statute 5 *Geo.* 2. c. 25, against an absconding Defendant, see *Knowles* v. *Broome*, the preceding Case.

1813.
Lincoln's Inn Hall.
Jan. 15.

GRIFFITH v. WOOD.

Full Costs on a Demurrer allowed to a third Bill for the same Cause under the General Order, 1794, upon a subsequent Application.

A GENERAL Demurrer having been allowed in *April* 1812, and the usual Order drawn up for the common Costs, the Defendant moved for the full Costs, on the Ground of the Plaintiff's vexatious Conduct; the Bill, to which the Demurrer was allowed being

 the

1813. GRIFFITH v WOOD.

the third filed by him for the same Cause; and he had since filed a fourth.

Sir *Samuel Romilly*, and Mr. *Cooke*, for the Motion, referring to the General Order of Lord *Loughborough* and Lord *Alvanley (a)* said, the Objection, that farther Costs had not been given, when the Demurrer was allowed, had been over-ruled upon a Plea allowed to one of the former Bills: the Court giving farther Costs upon a subsequent Application.

The Lord CHANCELLOR made the Order.

(a) 6th *February*, 1794, 4 *Bro. C. C.* 545.

1813. *Jan.* 27, 28. *Feb.* 12.

TOBIN, *Ex parte*.

Certificate under a separate Commission of Bankruptcy, lying before the *Lord Chancellor* for Allowance, not stayed by suing out a joint Commission.

Order allowing the Certificate, impounding the separate Commission, and transferring the Proceedings and Proofs to the other Commission.

THIS Petition was presented by a joint Creditor, who had taken out a joint Commission of Bankruptcy; praying, that a separate Commission against One of the Partners may be superseded; which was resisted on the Ground, that under the separate Commission the Certificate had been obtained; and lay before the *Lord Chancellor* for Allowance.

Sir *Samuel Romilly*, in support of the Petition.

Even if the Bankrupt has absolutely got his Certificate, your Lordship will either supersede the separate Commission, or give the joint Creditor an Opportunity of assenting to or dissenting from the Certificate: as in the late Cases, *Ex parte Fowler*, *Patten*, and *Wilson*, without any Pretence of Misconduct. The only Object of this Peti-

1813. TOBIN, *Ex parte.*

tion is, that the first Commission may proceed without all the Difficulty, that must be the Consequence of sustaining the separate Commission. Admitting the Conduct of this Bankrupt to be fair, he has obtained his Certificate with great Expedition, in Three Months from the Date of the Commission: the Debts proved under that Commission being only £400; though he is a Debtor to the Amount of £60,000; and no joint Creditor having proved except the petitioning Creditor. The great Inconvenience that may ensue, will induce your Lordship to pause, before you decide, that a Certificate, signed in Three Months under a separate Commission, the other Partner not having then committed an Act of Bankruptcy, shall prevent a joint Commission.

Mr. *Bell*, for the Bankrupt under the separate Commission, urged, that the *Lord Chancellor* in *Ex parte Hamper* (*a*) and many other Cases had declared, that a Certificate, having got the Length of being laid before the *Lord Chancellor* for Allowance, should not be defeated by suing out a joint Commission.

Jan. 28.

The Lord CHANCELLOR said, the Bankrupt must have his Certificate on this Ground; that the Petitioner had permitted it to proceed, until it was ready for Allowance without any Application to come in for the Purpose of assenting or dissenting; under which Circumstances it would be very hard to permit him to stop it.

Feb. 12.

Mr. *Bell* mentioned *Ex parte Leaverland* (*b*); as confirming the Opinion expressed in *Ex parte Hamper*, that

(*a*) 17 *Ves.* 403. (*b*) 1 *Atk.* 145.

1813.

TOBIN, *Ex parte.*

the Certificate would be destroyed by superseding the Commission.

The Lord CHANCELLOR.

I think, I may grant the Certificate, impounding the Commission with the Secretary, not to be produced without my Order. That was the Course I adopted in the late Case *Ex parte Rawson* (a), superseding the joint Commission against the Two. I will make that Order with the Addition, that all the Proceedings and Proofs of Debts shall be transferred to the other Commission.

(a) *Ante*, p. 160.

1813.
Feb. 11.

BROWNE *v.* BYNE.

Order to dismiss the Bill for Want of Prosecution, though regular according to the present Practice, not requiring Notice, if before Replication, nor the Six-Clerk's Certificate at the Time of making the Motion, discharged without Costs upon the Defendant's Laches.

IN *May*, 1809, a Bill was filed for the specific Performance of an Agreement; and a Bill for the Purpose of having it delivered up to be cancelled: in both Suits Answers were put in. On the 30th *May*, 1811, the Defendants in the cross Cause obtained an Order to dismiss the cross Bill for Want of Prosecution; but the usual Certificate, obtained from the Clerk in Court for that Purpose, had not, when signed by the Six-Clerk, the proper concluding Word, "since which no farther "Proceedings have been had." Those Words were afterwards added by Interlineation. That Order was not drawn up: but another Motion was made on the 12th *May*, 1812, to enter the Order *nunc pro tunc*; and the Order, made on that Motion, was not served until the 30th of *January*, 1813.

A Motion

1813.
BROWNE
v.
BYNE.

A Motion was made to discharge the Order to dismiss the cross Bill on Affidavit of these Facts, and that no Notice was given of the Motion to dismiss.

Mr. *Hall*, in support of the Motion, contended, that the Order had been obtained by Surprise, and against the usual Curtesy of Practice.

Mr. *Cullen*, for the Defendant, insisted, that the Order was regular, according to the Practice, as now settled, that Notice is not necessary *(a)*.

The Lord CHANCELLOR.

This Motion depends on Two Circumstances. If the Words interlined stood originally Part of the Six-Clerk's Certificate, then the Order to dismiss the Bill was regular: if those Words were not originally there, it will probably turn out, that the *Register*, when applied to, for the Order, observed the Omission; and those Words were afterwards inserted by the Six-Clerk. Considered with extreme Strictness this is not regular; as, when the Application is made to the Court, I must understand the Order as at that Time made, and the Recital as correctly true; which it was not: but that strict Regularity would introduce Mischief in actual Practice: the general Convenience being much forwarded by this Attention of the *Registers (b)*.

The Point, now to be considered, is, what has been done upon that Order; and, if nothing has been done,

(a) *Degraves* v. *Lane*, 15 *Ves.* 291. *Naylor* v. *Taylor*, *Jackson* v. *Purnell*, 16 *Ves.* 127. 204.

(b) See *Wills* v *Pugh*, 10 *Ves.* 402. *M'Mahon* v. *Sisson*, 12 *Ves.* 465.

whether

1813.

BROWNE v. BYNE.

whether the Party ought not to be now put in the same Situation, as if upon Notice they had come to the Court; proposing upon the Nature of the Two Causes to discharge the Order to dismiss under the Circumstances of both Causes, and upon Terms. Here is a Bill for the specific Performance of a Contract, and on the other Hand a cross Bill to rescind it. I do not enter into the Merits farther than the Observation, that there is a necessary Connection between these Suits. Answers were put in to both Bills so long ago, that an Order was made on the 30th of *May*, 1811, to dismiss the Bill in the cross Cause on the Ground that no Step had been taken by the Plaintiff in that Cause for Three Terms. That Bill was dismissed by the Order; supposing it regular: but nó Proceeding was had for the Purpose of drawing up that Order for a Year; and after that Delay they applied to draw it up *nunc pro tunc*. Having obtained that Order, they take no Step to serve it until the 30th of *January*, 1813. In the mean Time nothing was done in the original Cause.

The present Application is made as soon as could be after the first effectual Service of the Order, made on the 30th of *May*, 1811, the Moment they knew of that Proceeding, to reinstate the Cause. If I could have reinstated it immediately, upon the Nature of both Causes and their Connection, why should I not do so now nothing being done on the other Side; and the Order not served until *January*, 1813.

I have no Difficulty in saying, I will discharge this Order without any Costs; that it may be understood I do so on account of this Delay.

1813.
Feb. 12, 20, 26.
(17 Ves. 255.)

WRIGHT v. ATKYNS.

Devise to *A.* and her Heirs for ever, "in "the fullest "Confidence "that after her "Decease she "will devise "the Property "to my Fa- "mily" being restrained to an Estate for Life by Decree at the *Rolls*, the Devisee was injoined from cutting Timber pending an Appeal.

THE Decree, pronounced at the *Rolls* in this Cause (a) declaring the Defendant Tenant for Life in her own Right, and a Trustee as to the Remainder in Fee for the Plaintiff, and giving the Directions prayed accordingly for raising the Charges by a Sale, &c. the Plaintiff moved for an Injunction to restrain her from cutting Timber, &c. She had appealed from the Decree at the *Rolls*.

Mr. *Richards*, Sir *Samuel Romilly*, and Mr. *Heys*, in support of the Motion, urged, that, whatever Question might be made, whether a Decree should be executed pending an Appeal, there can be no Doubt, that a Party shall not in direct Defiance of the Decree be permitted to do irreparable Mischief.

Mr. *Leach*, Mr. *Hall*, and Mr. *Bell*, for the Defendant.

The Effect of this Will is, that the Defendant has the Inheritance, until she executes what the *Master of the Rolls* considers a Trust. What is the Analogy between such an Estate, and a mere legal Tenancy for Life? The Bill does not pray an Injunction; which this Court is not in the Habit of granting without a special Prayer: *Savory* v. *Dyer* (b); and there is the less Reason to stretch the Practice in the Instance of a Trust of this indefinite Description.

Mr. *Richards*, in Reply.

The Estate, which the Defendant takes under this Will, cannot be distinguished from a legal Tenancy for Life; and

(a) 17 *Ves.* 255. (b) *Amb.* 70.

surely

1813. WRIGHT v. ATKYNS.

surely without putting the Party to the Inconvenience of filing a new Bill, praying an Injunction, this Court will interpose to restrain a Tenant for Life from committing irreparable Injury. The Decree at the *Rolls* standing unreversed, the clear Right, arising under it, cannot be affected by the mere Omission to pray an Injunction.

The Lord CHANCELLOR.

In all these Cases upon Words of Recommendation, Trust, Confidence, &c. the Party has according to all the Authorities from *Hobart* downwards a Power of Disposition in Favor of any Person, answering the Description at his Death. With regard to the Injunction there is a Distinction upon the Practice: generally if the Bill does not pray an Injunction, the Plaintiff cannot move for an Injunction under the Prayer for general Relief: but if after a Decree for an Account under a Bill for Foreclosure the Mortgagor attempted to cut Timber, the Court would enjoin him, though there was no Prayer for that. I incline to think, that whether the Defendant is Tenant for Life without Impeachment of Waste, or not, after this Decree for a Sale of Part of the Estate the Court would not permit any one to cut Timber in the mean Time. As to the rest of the Case I will grant the Injunction at present; considering it open, if the Defendant chooses to apply at the next Seal.

Feb. 26. A Motion was made to dissolve the Injunction.

Mr. *Leach*, Mr. *Hall*, and Mr. *Bell*, in support of the Motion.

The Object in cutting this Timber, which was fit for cutting, was to repair the Mansion House, in a ruinous and dilapidated State. The Question is, whether under this Devise the Defendant can be considered in any other Light

1813. WRIGHT v. ATKYNS.

Right than as a Tenant for Life without Impeachment of Waste. She was evidently the primary Object of the Testator's Bounty; who, it must be conceived, intended to give her for her Life the most beneficial Interest. The Court, restraining her Interest to a Tenancy for Life, preventing her Alienation, did not mean to impede or restrain, the full Use and Enjoyment during her Life, as if she had the Inheritance. The Objection, that the Injunction is not prayed, must not be overlooked.

Mr. *Richards*, Sir *Samuel Romilly*, and Mr. *Heys*, for the Plaintiff.

Until this Decree is reversed, it must be presumed to be right, and accordingly must be obeyed. The Decision in *Dyer* (a), upon which it is founded, has been approved by Lord *Hobart* and Lord *Hardwicke*. This Decree has decided, that the Defendant is not entitled to the Inheritance; and an Estate for Life is always impeachable for Waste, unless by positive Limitation. That Restraint is an Incident of every Tenancy for Life. The Timber is Part of the Inheritance; as much so as the Soil, Mines, &c. The Power, which it is contended she has by this Devise of selecting the Object, on whom the Inheritance shall devolve, cannot enlarge her Interest: or make it more than a mere Estate for Life.

The Lord CHANCELLOR.

I have not the slightest Doubt, that the Testator did not mean, that the Defendant should be impeached for Waste: but I cannot avoid the Construction, that her Heir at Law would be a Trustee for his heir at Law; and then the Consequence must attach. This Sort of Trust is generally a Surprise on the Intention: but it is too late to correct that. *Feb.* 26.

(a) *Chapman's* Case, *Dy.* 333.

I certainly

1813.

WRIGHT v ATKYNS.

I certainly do not know a Case, that resembles this. The Effect of the Will, upon the Doctrine of this Court, reducing the Estate to a Tenancy for Life, the Consequence seems to follow; unless it is better excluded than it appears to be by this Will. Conceiving these Cases, upon Words of Hope, Confidence, *&c.* to be generally decided against the Intention, I have endeavoured to raise a Distinction in the Defendant's Favor, but cannot. I do not believe the Testator intended a mere Trust: but that must be the Construction, if the Word "Family" is properly construed.

1813. *Feb.* 20, 22.

BYNE, *Ex parte.*

A Person attending Commissioners of Bankruptcy, without a Summons, swearing, that he was a material Witness, and not contradicted, protected from Arrest, while remaining, though having left the Room by Order for the Purpose of separate Examination; and while returning: whether while going. *Quære.*

Order to be discharged immediately, by the Party in the first Instance; if disobeyed, to be extended to the Officer, with Costs.

Application at the Bar without a Petition the proper Form in such a Case; and Time to answer the Affidavit refused.

AN Application was made on Affidavit, without a Petition, for the Discharge of a Person, arrested under the following Circumstances.

Under the Order, lately made by the *Lord Chancellor (a)* for proceeding in the Examination of *Bryant*, a Bankrupt, as far as it related to the Title and Value of the Estate at *Woldingham*, a Meeting was held at *Guildhall*; and was adjourned for the Purpose of having a private Meeting; at which *Byne* attended, without a

(a) *Ex parte Bryant, Ante.*

Summons,

1813.

BYNE, *Ex parte.*

Summons, tendering himself to the Commissioners as a Witness. The Commissioners acceding to a Proposal, that the Witnesses should be examined apart, *Byne* by their Order withdrew; and soon after he had left the Room was arrested at the Suit of the Bankrupt upon a Judgment obtained in the Year 1806.

Sir *Samuel Romilly*, in support of the Discharge resisted an Application for Time to answer the Affidavit; observing, that in the mean Time the Party is in Custody unjustly; and referring to *Aylet*'s Case; where Lord *Thurlow* took the Examination *vivâ voce.*

Mr. *Cullen*, for the Bankrupt said, that for the Purpose of an Examination *vivâ voce* the Client must be produced.

The Lord CHANCELLOR permitted the Application to proceed; observing, that it may happen, that the Client cannot be produced; that this, being in Bankruptcy, is the proper Form of Application; and that it must be heard immediately, in order to an immediate Determination, whether it would be right to act.

Sir *Samuel Romilly*, Mr. *Bell*, and Mr. *Montague*, in support of the Application to discharge.

The only Question is, whether a Person, attending Commissioners of Bankruptcy without a Summons for the Purpose of being examined, is entitled to Protection from Arrest. There is no Doubt of the Right of this Person to be discharged, according to your Lordship's Opinion in *Ex parte King (a)*, that a Creditor, attending merely to prove his Debt, without a Summons, is protected, This

(a) 17 *Ves.* 312. See 316.

Person

1813.

BYNE, *Ex parte.*

Person attended in consequence of your Lordship's Order, to give material Information relative to the Estate, which was the Subject of that Order; and having also a Claim on the Proceedings under this Commission, depending on his Right to this Estate, which he sold to the Bankrupt; but has never received Payment. Immediately on leaving the Room by Order of the Commissioners, who thought it right, that the Witnesses should be examined apart, he was arrested under a Judgment, obtained by the Bankrupt in 1806. The public Meeting at *Guildhall*, restrained by the late Order to an Investigation of the Title and Value of this Estate, was adjourned for the Convenience of the Bankrupt, that the Inquiry might not be public. The Protection clearly extends to all Persons, generally, coming to assist in the Administration of Justice. This Person was attending at the Moment for the Purpose of being examined; and went out by the Direction of the Commissioners merely while the other Witnesses were under Examination. He was arrested upon a Writ, issued on the same Day, while the Inquiry was proceeding, by the Bankrupt; who is not the Creditor; the Right to the Debt having passed to his Assignees. The Arrest is therefore clearly illegal; and the Costs are not an adequate Compensation.

Mr. *Cullen*, for the Bankrupt.

The Extension of the Privilege now sought goes beyond all Precedent. In the Case of *Meekins* v. *Smith* (a) the Party, though attending certainly without a Summons, was called on to attend in respect of the Relation he had to the Cause: but the Consideration as to the Attendance of Witnesses is very different. They

(a) 1 *H. Black.* 636.

are

are entitled to Protection only as far as their Presence is necessary for the Interest of others. This Person, is a mere Stranger as to the Inquiry before the Commissioners; with no direct Interest to be affected by the Proceeding under this Commission. He must therefore be considered as a Volunteer, attending from Motives of Curiosity. The Distinction of this Case from *Meekins* v. *Smith* is, first, that this is not a Cause: secondly, that this Person was not called on to attend. He was neither a Party, nor a Person interested. Your Lordship's Observations in *Ex parte King* are applied to the Creditor, considered as Suitor in a Cause.

Mr. *Wingfield* one of the Commissioners, stated, that they were proceeding to enquire into the Title and Value of the Estate, when the Objection was made, that these Inquiries should not be made in the Presence of *Byne*; who had filed a Bill, claiming the Estate as his own. The Commissioners therefore informed him, that they could not permit him to hear the Objections of other Persons to the Bankrupt's Title; but would afterwards hear his Objections; that certainly he had not been summoned: but there he was.

The Lord CHANCELLOR.

Protection from Arrest of Persons attending Commissioners of Bankruptcy for the Purpose of aiding them in the Administration of Justice *eundo morando & redeundo*, not by having a Summons, but upon Principles applying to a Witness or Party.

It was settled by Lord *Kenyon*, and that has been since acted upon, that Persons attending Commissioners of Bankruptcy for the Purpose of aiding them in the Administration of Justice in Bankruptcy, are, not upon the Circumstance of having a Summons, but upon Principle and the Nature of the thing, protected *eundo morando & redeundo*. I understood the Commissioners at this very Examination to have been acting under their general Authority to examine the Bankrupt, limited in consequence

of

1813.

BYNE, *Ex parte.*

of what fell from me: but they did not require my limiting Order to enable them to go on: it was rather a Hint to them to stop. The Consequence is, that any Person, attending them upon that Inquiry, was attending under Circumstances, entitling him to that Protection, which a Witness or Party has. It is very clear, that this Protection does not require a Summons. Suppose a Witness offers to attend without putting the Party to the Expence of a *Subpœna*: if he is actually there, he is in the same State as if attending upon a Summons; as, being there, the Court will not part with him, if his Presence is necessary for the Purposes of Justice.

It is clear upon the Proceedings in this Bankruptcy, that *Byne* is a very material Witness upon this Inquiry; and, if he went, tendering himself for Examination, and the Hearing him in the Character, in which he proposed himself, was merely postponed by the Commissioners, under these Circumstances he is clearly entitled to Protection, and in returning, or going into another Room, &c. The Question is merely upon the Fact. When that is ascertained; the Application of the Principle is clear. I do not consider this Person as attending for the Purpose of establishing any Claim of his own: but, if he was attending to be examined for the Purpose of the Inquiry, to which the Commissioners were confined by my Order, and an Objection arose to his Examination upon his Interest, still, until the Commissioners had overruled that Objection, upon the Point of his Interest, he was entitled to Protection. The Commissioners I understand did not feel, that there was any Objection to receiving the Information he wished to tender: but they very properly thought it right first to hear other Persons in his Absence; and postponed his Examination; not deciding, that he should not be heard.

Let

Let *Bryant* therefore if he pleases, make an Affidavit; which, if I should have left the Hall, may be sent to my House; but, this Question must be decided immediately; and, therefore, if I have not such Affidavit by Five o'Clock, this Person must be discharged. 1813. BYNE, *Ex parte.*

A very nice Question might arise upon the Effect of the Want of a Summons, where the Arrest happens *eundo*: but, if the Person without a Summons, goes to discharge that Duty, which the Summons would compel him to discharge, and is actually before the Judicature, there tendering his Evidence, the Want of a Summons can never deprive him of the Privilege.

The Bankrupt produced an Affidavit: but it had not been filed; and he referred to *Kinder* v. *Williams* (a). *Feb.* 22.

Sir *Samuel Romilly*, in Reply.

The Case of *Kinder* v. *Williams* was over-ruled in *Ex parte King* (b). What *Byne* had to state was most material upon this Inquiry into the Title and Value of this Estate, with a View of ascertaining, whether it was sufficient to satisfy the Bankrupt's Debts. *Byne* attended to state, that he had sold the Estate, and had not been paid for it; that he had therefore a Lien. Is not that a material Fact? This Right to Protection cannot depend on such a Circumstance as whether the Party has or has not a Summons. If a Person happening to be near the Court, attended voluntarily to give material Evidence in a capital Case, would he not be protected?

(a) 4 Term Rep. 377. (b) 7 Ves. 312.

1813.

BYNE, *Ex parte.*

The Lord CHANCELLOR.

Whenever an Application is made, either to the *Lord Chancellor*, or a Court of Law, or a Judge at Chambers, upon such a Subject as this, the Rule, by which the Fact is to be examined, is, and must of Necessity be, that the Court must believe the Affidavit, so far as it is not contradicted by the Person, against whose Arrest the Application seeks Relief. That was the Rule, upon which Lord *Thurlow* acted in *Aylet's* Case; discharging him upon what he swore in Court; though not believing a Word of it; leaving them to the Remedy by Indictment; a Course which was successfully pursued in that Instance.

The Facts of this Case I must collect from the Affidavit of *Byne*; from that of *Bryant*, as far as it is material, and from what has been stated to me in Court by one of the Commissioners. The Meeting of the Commissioners was not merely held under an Order of mine; but was in the Exercise of their general Jurisdiction to examine the Bankrupt; which Examination was by my Order, properly or improperly, confined to the *Woldingham* Estate. It is alledged, that this Person is not to be considered as attending under a Summons; and I take it so; that there was no Summons, *Bryant's* Affidavit shews a strong Case, that *Byne* can have no Claim to the Estate: but the Truth of that is not material upon the Point of Discharge. The Question for my Consideration is only, whether upon a Reference to the Commissioners to enquire as to the Title and Value of this Estate it was not for them to consider, how far this Claim affected the Title or Value; and whether a Person, proposing himself for Examination upon those Points, was or was not, to be received by them as a Witness.

Admitting therefore that *Byne* had no Summons, first, is not a Person, duly attending Commissioners of Bankruptcy

ruptcy as a Witness, though without a Summons, entitled to Protection? I will not repeat all the Reasons, upon which I formed an Opinion in a former Case against which I believe no Authority will be found, that Witnesses, if duly attending Commissioners of Bankruptcy, are entitled to Protection as much as when attending other Tribunals, more properly called Courts of Justice: I mean the Courts of Record in *Westminster Hall*; and my Opinion, to which also there is no Contradiction, is, that a Summons is not necessary.

I do not decide, what would be the Effect of an Arrest, where the Party was proceeding to a Court of Justice; and nothing was done in that Court. It will be Time enough to determine that, when such a Case occurs: but, if a Person, attending without a Summons, tenders himself for Examination, and the Court does not repudiate him as a Witness, but proposes to go into the Examination, and he is waiting for that Purpose, or is conducting himself according to their Pleasure, directing the Manner of the Examination, his Appearance there being merely voluntary, that is not a Ground, entitling another Person to arrest him. Did the Commissioners deal with him as a Person to be examined upon some Point of the Inquiry, referred to them? He positively swears, that they did; that it was proposed, that the Parties should be examined separately; and was so adjudged: and that this Person should not be examined until after the Examination of the other Parties. That is a Decision, that they had accepted him as a Witness. It is not for me, or any other Court, to say, whether it may turn out, that his Examination was, or was not, material. He must be entitled to Protection in order to ascertain that. The Fact is sworn to: in that he is not contradicted; and, if he swears falsely, that must be set right another Way.

1813.
BYNE,
Ex parte.

As to the Costs, I do not believe, any Contempt was intended. but a Person, arrested, who ought not to be arrested, is entitled to be discharged at the Expence of the Person, who arrested him. Upon that Ground alone therefore he is entitled to Costs. Let him be discharged with Costs.

Take the Order in these Words; that *Bryant* discharge him; and, if he does not, let the Officer attend me again To-morrow; and I shall then order them both to discharge him *(a)*.

(a) *Ex parte Donlevy*, 7 *Ves.* 317.

1813,
Feb. 12, 20.

BOEHM *v.* DE TASTET.

Defendant in Contempt, under an Order for a Messenger, putting in an Answer, to which Exceptions were allowed, Plaintiff, not having accepted Costs, may immediately proceed upon the old Process without Subpœna or Notice for a better Answer: but, if in Custody the Process discharged pending the Reference by Tender of Costs.

In a Case of doubtful Practice farther Time to answer allowed on Terms.

THE Bill prayed an Account. On the 10th of *November*, 1812, an Attachment issued against the Defendant, for want of an Answer; and on the 16th an Order was made for the Messenger to take the Defendant into Custody. On the 18th, the Defendant filed his Answer; to which Exceptions were taken; and the Master on the 3d of *February*, reported the Answer to be insufficient in all the Points excepted to. The Plaintiff's Clerk in Court, conceiving that, as the Answer was reported insufficient, a Subpœna for a better Answer was unnecessary, and that the Order of the 16th of *November* remained in Force, instructed the Messenger to take the

Defendant

Defendant into Custody, which he accordingly did on the 6th of *February*.

1813.

BOEHM v. DE TASTET.

A Motion was made, that the Defendant may be discharged out of the Custody of the Messenger, with Costs.

Mr. *Bell*, and Mr. *Shadwell*, in support of the Motion, contended, that the Caption was irregular: the Process of Contempt could not within the Terms of Lord Keeper *Finch*'s Order (*a*) be proceeded on, until revived by a Rule

(*a*) General Order, 1676: "That in all such Cases, "where the Defendants are "to make farther Answers, "the Plaintiff shall not "be obliged to serve the "Defendant with a Subpœna to make a better "Answer, but shall only be "obliged to give a Rule to "make a better Answer, if it "can be given in Term "Time, or if not, then to "give the Defendant's Clerk "in Court a Copy of the "Order or Report, whereby "the Defendant shall be "ruled to make such better "Answer during the Continuance of the public Seals, "before, or after the Term: "and if after such Rule or "Notice is given, the Defendant do not in Eight "Days put in a perfect Answer, or by Order, or Consent of the Clerk on both "Sides, obtain a Commission to answer, and thereby return a perfect Answer at the Return thereof, the Process of Contempt shall issue for Want "thereof; and in case any "former Process of Contempt shall have issued "against such Defendant "for Want of appearing or "answering, the Plaintiff "may resort back to such "Process of Contempt, and "proceed thereupon, after "such Rule or Notice given "as aforesaid, notwithstanding the Costs of such former Process were paid "upon the coming in of "such insufficient or frivolous

1813.

BOEHM v. DE TASTET.

Rule or Notice; no Subpœna having issued for a better Answer; and the Case of *Bromfield* v. *Chichester* (a) could not be considered an Authority against a General Order of the Court: nor can a Course of erroneous Practice, however long continued, prevail against such Order: *Broomhead* v. *Smith* (b).

Sir *Samuel Romilly*, Mr. *Hart*, and Mr. *Wilson*, for the Plaintiff.

Under these Circumstances, Process of Contempt to a Messenger issued against the Defendant, and an Answer reported insufficient, Notice is not required: but the Plaintiff may according to the present Practice, and the Case in *Peere Williams* (c) take up the former Process. The Order relied on, if inconsistent with the Practice, must be rejected as obsolete: but it seems to be confined to the Case of Costs paid and accepted; which would have purged the Contempt. This Plaintiff, not having accepted the Costs, is therefore entitled to take up the Process, where it dropped; and is not obliged for the Purpose of compelling a farther Answer to begin *de novo*.

The Lord CHANCELLOR.

I have taken the Practice to be thus; that where Process of Contempt issues for Want of an Answer, and an

" lous Answer, Plea, or De-" murrer; but when the " Defendant hath put in a " full Answer, such Costs as " he had paid for such for-" mer Process, shall upon " Payment of the rest be " deducted and allowed to " him." (See Ord. in Ch. p. 193, Ed. 1698).

(a) 1 *Dick.* 379.

(b) 8 *Ves.* 357

(c) *Anon.* 2 *P. Will.* 481. See *Child* v. *Brabson*, 2 *Ves.* 110. *Bailey* v. *Bailey*, 11 *Ves.* 151. *Waters* v. *Taylor*, 16 *Ves.* 417. *Coulson* v. *Graham*, the following Case.

Answer

1813.

BOEHM v. DE TASTET

Answer is put in, the Defendant is then entitled to be discharged from Custody on paying the Costs, or on Tender and Refusal. I had also supposed upon Recollection, that, if the Costs were accepted, and the Answer was reported insufficient, the Plaintiff must begin *de novo*: but, if they were refused, he could go on with the old Process, in some Sense without Notice: as, if the Defendant has not Notice, what the Report is, it is his own Fault. The Court had come to this Conclusion; that it was improper to deprive the Defendant of his personal Liberty, unless the Court would at the Moment look into the Answer, and see, whether it was sufficient; which was not the Habit of the Court.

Effect of continued Practice against an Order of Court.

I had no Recollection, that this Order was ever mentioned. I admit the Difficulty I found in the Case of *Broomhead* v. *Smith* (a) upon a Practice subsisting against a positive Order, not appearing to have been reversed; but from a Manuscript Book, containing all the written Orders, which was presented by Mr. *Dickens* to Lord *Loughborough*, who handed it to me, as I shall to my Successor, I can see, that it is impossible for this Court in many Instances to support its present Practice upon the Notion, that a continued Practice does not nullify a written Order; that involving certainly a serious Question.

With the View to a right Decision upon this Point I consulted the Registers; and also inquired from the Officer, executing the Process, what was the Practice on his Part. His Answer was, that he could not discharge the Defendant without personally knowing, whether he had paid, or tendered, the Costs. That Circumstance, that the actual Practice of the Messenger is different according to the Fact, whether the Costs are paid, or not, is very

(a) 8 *Ves.* 357.

1813.

BOEHM v. DE TASTET.

striking; and requires great Attention; as, unless that Distinction is correct, there is false Imprisonment in every Instance. If the Report of Insufficiency, not excepted to, is a Ground for reviving the Process, how can the Defendant be ignorant, what the Report is? It is his own Fault, if he will not attend, when the Master settles his Report.

Upon these Grounds I have decided according to the Case, cited from *Peere Williams* (a), that, if the Plaintiff insists, that the Answer is insufficient, the Court says, that is to be tried in the Master's Office; and the Defendant, paying or tendering the Costs, shall not be deprived of his Liberty, while that is under Consideration: but the Moment that turns out no longer to be a Subject of Consideration, there is no Reason, why he should not be in Custody. I have frequently ruled the Process, as it is now stated, to be regular; certainly without any Knowledge of this Order: but much of modern Practice will, I fear, be found inconsistent with subsisting Orders, without any Contradiction of them by subsequent Orders; and upon Principle repeated Decisions, forming a Series of Practice, as it must be, against an Order, may with Safety be taken to amount to a Reversal of that Order.

Repeated Decisions, forming a Series of Practice, may amount to the Reversal of an Order.

My Opinion therefore is, that this Process is regular.

Feb. 20. *The Lord* CHANCELLOR said, that upon Consideration and Communication with those, who were most competent to correct any Error on this Subject, his Opinion, that this Practice was regular, continued: but in such a Case, a fair Opinion having been held the other Way, it

(a) 2 *P. Will.* 481.

would

would not be unreasonable to allow a short Time upon the Terms imposed in the Case of *Pigott* v. *Stacie*, produced from the *Register's* Book: requiring an Affidavit, that the Defendant did not intentionally put in an insufficient Answer.

1813.
BOEHM v. DE TASTET.

An Affidavit having been afterwards produced, stating, that the Schedules to be annexed to the Answer were very long and complicated, the *Lord Chancellor*, made an Order, giving the Defendant a Fortnight upon the Terms in *Pigott* v. *Stacie* (a).

(a) *Pigott* v. *Stacie*, 14 *June*, 1775. Reg. Lib. B. 1774, fo. 296.

Application on the Part of a Defendant to be discharged out of the Custody of the Messenger, upon a *Cepi Corpus*, after an insufficient Answer, for Irregularity, upon the Ground, that the Plaintiff had not served him with a Subpœna to make a better Answer.

"Upon opening, &c. to "*L. C.* by Mr. *Madocks* and "Mr. *Hollist*, of Counsel "with the Defendant *John* "*Stacie*, it was alledged, "that by an Order of the "27th Day of *May* last, "(suggesting, that, the De- "fendant *John Stacie* being "in Contempt for Want of "his Answer to the Plain- "tiff's Bill, an Attachment "issued against him direct- "ed to the Sheriff of *Mid-* "*dlesex*, who returned a *Cepi* "*Corpus* thereon), it was or- "dered, that the Messenger, "attending this Court, should "apprehend the said De- "fendant, and bring him to "the Bar of this Court, to "answer his said Contempt, "whereupon such farther "Order should be made as "should be just; that the "said *John Stacie* appre- "hends the Plaintiff was ir- "regular in applying for "the said Order, for that the "said Defendant *John Sta-* "*cie's* Answer was reported "insufficient: yet the Plain- "tiff should have served him "with a Subpœna to make "a better Answer, which he "hath not done; and there- "fore it was prayed, that "the said Order might be "discharged for Irregula- rity;

1813.

BOEHM v. DE TASTET.

"rity; and that the said Defendant *John Stacie* might "be discharged out of Custody of the Messenger; "or, that it might be referred to one of the "Masters of this Court to "certify, whether the said "Order was obtained regularly, or not; whereupon, "and upon hearing of Mr. "*Attorney-General* and Mr. "*Solicitor-General* and Mr. "*Selwyn* of Counsel for the "Plaintiff, and of what was "alledged by the Counsel "for the said Parties, his "Lordship doth order, that "upon the Defendant *John* "*Stacie's* entering his Appearance with the *Register* "by his Clerk in Court in "Four Days, consenting "that the Serjeant at Arms, "attending this Court, shall "go, and take the said Defendant into his Custody, "as on a Commission of "Rebellion returned *non est* "*inventus*, in case he doth "not put in his Answer by "the Time hereinafter mentioned, the said Defendant "*John Stacie* be discharged "out of Custody of the "Messenger as to his said "Contempt; and that the "said Defendant have a "Month's Time to put in "his farther Answer."

Pigott v. *Stacie*, 6th *July* 1775. Reg. Lib. B. 1774, fo. 411.

After the Order of the 14th *June*, the Plaintiff (upon the usual Allegations) obtained an Order to amend his Bill, and that the Defendant should answer the Amendments and Exceptions at the same Time; upon which the Defendant by Petition to the *Lord Chancellor* obtained the following Order.

"That upon the said Defendant undertaking to "ask no farther Time, and "upon his consenting, that "the Serjeant at Arms should "go against him, as on a "Commission of Rebellion "returned *non est inventus*, "in case he did not put in "his Answer by the Time "thereafter mentioned, the "Defendant should have a "Month's farther Time to "put in his farther Answer "to the said Exceptions "from the Expiration of the "said former Order, and "that in the mean Time all "Proceedings by the Serjeant at Arms for Want of "the said Defendant's Answer should be stayed."

COULSON

1813.
LINCOLN'S INN HALL,
Feb. 20.

COULSON *v.* GRAHAM.

After Answer, reported insufficient, Plaintiff may proceed upon his old Process of Contempt without a new Order, if he has not accepted Costs.

IN this Cause, a Question, was made similar to that raised in *Boehm* v. *De Tastet* (*a*).

Mr. *Leach*, and Mr. *Wingfield*, for the Plaintiff; Mr. *Agar*, for the Defendant.

The Lord CHANCELLOR, referring to his Judgment in that Case, repeated his Opinion, that, after the Master has reported the Answer insufficient, the Plaintiff may go on upon his old Process of Contempt without any new Order, if he has not accepted Costs from the Defendant.

(*a*) The Preceding Case.

1813.
LINCOLN'S INN HALL,
Feb. 24.

ROWE *v.* GUDGEON.

The Practice in the Master's Office to report an Answer insufficient generally upon establishing one Exception, without entering into more, corrected.

THE Defendant moved, that the Master might be directed to specify, what particular Exceptions, taken to the several Answers, he had allowed, and what he had over-ruled; in order that the Defendant might apply his additional Answer specifically to the Exceptions, that were allowed.

Mr. *Hall*, in support of the Motion.

In the Case of Exceptions, taken in the first Instance to an Answer, the Master reports on each Exception specially;

1813.
ROWE
v.
GUDGEON.

cially; precisely distinguishing, which Exceptions he allows, and which he over-rules: but if the Answer is again referred to him, he satisfies himself, however numerous the Exceptions are, with reporting generally, that the Answer is insufficient. This Practice requires Alteration; the Defendant being incapable of ascertaining the Nature of the Master's Objections.

Mr. *Bell*, for the Plaintiff, resisted the Motion, as at Variance with the Practice; and observed, that the Circumstances of the Case, shewing the most studied Delay in the Defendant, would induce the Court not to depart from the strict Rule in this Instance.

The Lord CHANCELLOR.

I am aware, that the Practice of the Master's Office is, that, where Exceptions are taken to an Answer, in this Stage the Master deals with them, as they do with Indictments at the *Old Bailey:* if the first holds, not going into any of the others: perhaps Eighty or Ninety in Number; as, if the Prisoner is convicted capitally upon one Indictment, they consider it unnecessary to go into any other. That cannot be right. The Party may appeal to the Court; and, if this Practice of the Master is correct, it is equally right for the Court to look no farther than the first Exception, that is established. They may then go to the *House of Lords;* who must either go through all the Exceptions; giving an original Judgment upon all the rest; or must follow the same Course; confining their Judgment to the first. Has not the Party a right to have a Judgment upon each Exception? There is no consistent Practice upon this; as I found by Inquiry on a former Occasion.

Considerable

Considerable Difficulty occurs upon this particular Case; as it is now represented, that I over-ruled the Exceptions; and the Defendant asked Time; which has expired. I doubt, whether I did right in that: this being the first Instance of this Practice of the Office coming before the Court; and it would have been enough to have stated, that the Master had not heard the other Exceptions. If that had been mentioned, I would have sent it back; as it is not for me to decide upon an Exception, upon which the Master has not given his Judgment; nor for the *House of Lords*, until it has been decided both by the Master and this Court. It is impossible, that this Practice can be right; that a Defendant is to fail in his Endeavours to answer several Exceptions, because he has failed in answering one. I should feel a Difficulty in ordering the Master to specify what Exceptions he has allowed, when it is stated, that he has not heard more than one: but my Opinion is, that the Suitor has a right to the Master's Judgment upon each of the Exceptions.

I wish to communicate that to the Master; and will speak to him upon this particular Case.

Feb. 25.

The Lord Chancellor said, he had talked with Mr. *Cox*; who agreed, that on the Discussion of the Exceptions the Master's Judgment ought to be given on each; and, if the Bill and Answer were sent to him, he would point out his Opinion on each without any Order.

1813.
LINCOLN'S INN HALL,
Feb. 24.

SLINGSBY *v.* BOULTON.

Sheriff levying upon Goods alledged to be in Settlement, cannot maintain a Bill of Interpleader.

IN 1812 the Plaintiff, being Sheriff of *Yorkshire*, received a Writ of *Fieri Facias* upon a Judgment, obtained by the Defendant *Boulton* against the other Defendant, indorsed for £446. The Plaintiff levied; but receiving Notice, and a Copy of a Settlement of Part of the Goods, he made no Return: but afterwards paid in £329:2*s*. being the Residue of the Levy after deducting the Sum paid to the Trustees of the Settlement; who brought an Action of Trover against the Plaintiff for the Goods in Settlement; and, the Defendant *Boulton* also claiming, the Plaintiff filed a Bill of Interpleader; offering to bring the Money into Court, if the Court should be of Opinion, that under the Circumstances he ought to do so; and moved for an Injunction.

Mr. *Barber*, for the Motion, admitted, that this was a Bill of Interpleader without bringing the Money into Court; but insisted, that under the Circumstances of the Case it was not necessary.

Mr. *Johnson*, for the Defendant, resisted the Motion, on the Ground, that the Interposition of this Court to compel Defendants to interplead could not be obtained, when the Fund was not deposited.

The Lord CHANCELLOR.

Is there any Instance of a Bill of Interpleader by the Sheriff? He acts at his Peril in selling the Goods; and is concluded from stating a Case of Interpleader; in which the Plaintiff always admits a Title against himself in all the Defendants; and cannot say, that as to some he is a wrong-doer.

Plaintiff in a Bill of Interpleader admits a Title against himself in all the Defendants; and cannot say, that as to some he is a wrong-doer.

The

the Defendants, A Person cannot file a Bill of Interpleader, who is obliged to put his Case upon this, that as to some of the Defendants he is a wrong-doer.

No Order was made.

1813.
Feb. 12. 15.
March 3. 11. 12.

CORBETT v. CORBETT.

Order to read on a Trial, directed at Law, Depositions of Witnesses, proved by Affidavit from Age and Infirmity incapable of attending without great Danger of Death, with Liberty to examine them on Interrogatories, and the Depositions of such other Persons as should be proved at the Trial to be dead, or unable to attend: such Order, whether to be made in Equity or left to the Judge at Law, depending on a sound Discretion.

AFTER a Decree, directing the Plaintiff to bring an Ejectment at the next Spring Assizes for the County of *Salop*, a Motion was made, that the Plaintiff might be at Liberty to read the Depositions of the Defendant's Witnesses, taken in this Court in a Cause of *Corbett* v. *Corbett*, instituted in the Year 1791, and also the Depositions of the Plaintiff's Witnesses, taken in this Cause, at the Trial of the Ejectment, directed by the Decree, in case such Witnesses, or any, or either, of them shall be dead at the Time of the Trial, or shall be proved at such Trial to be in such a State of Health as not to be capable of attending the said Trial.

Mr. *Newland*, for the Motion, stated, that many of the Witnesses were very old and infirm; and it would be impossible for several of them but at the Hazard of their Lives to attempt attending the Trial; and mentioned the Case of *Palmer* v. *Lord Aylesbury* (*a*).

(*a*) 15 *Ves.* 299.

Mr.

1813.

CORBETT v. CORBETT.

Mr. *Benyon*, against the Motion, objected that, there was no Affidavit.

Mr. *Wilson* (*Amicus Curiæ*) mentioned the late Case of *Andrews* v. *Palmer* (a).

The Lord CHANCELLOR.

Witness being proved unable to attend a Trial ancillary to a Suit in Equity, the Depositions may be read without an Order: but not without producing the Bill, Answer, and all Proceedings.

There is a great Mistake upon this Subject of reading Depositions at Law. The Interposition of this Court is not from absolute Necessity: if the Depositions are taken in a Cause between the same Parties, and Proof is given at the Trial, that the Witnesses are unable to attend, the Depositions may be read without an Order. but then the Party must incur the Expence and Trouble of having the Bill, Answer, and all the Proceedings. To prevent that Inconvenience therefore, where the Trial is ancillary to a Suit here, an Order of this Court is obtained, directing the Judge at *Nisi Prius* to receive the Deposition without more Proof than that it is the Deposition. In the Case of *Palmer* v. *Lord Aylesbury* I had some Ground for concluding, that the Witnesses were unable to attend: but it would be very dangerous to make such an Order without some Foundation laid.

Feb. 15. *March* 3

The Motion, being refused, with Liberty to apply again on Affidavit, was renewed in this Form: that the Plaintiff might be at Liberty to read the Pleadings, Proceedings, and the Depositions of the Defendant's Witnesses taken in this Court in a Cause of *Corbett* v. *Corbett*, instituted in 1791, and also the Depositions of *Rebecca Roberts*, Wife of *Morris Roberts*, aged Seventy-five, and of *Mary Mitton*, Wife of *Thomas Mitton*,

(a) *Ante*, 21.

aged

CORBETT v. CORBETT.

aged Eighty-one, and upwards, and of [redacted] the Plaintiff's Witnesses, taken in this Cause, [illegible] of an Ejectment brought by the Plaintiff; pursuant to the Decree made, &c. as shall be dead at the Time of such Trial, or shall be proved at the Trial to be in such a State of Health as not to be capable of attending it.

In support of this Motion an Affidavit was read of a Physician and a Surgeon; stating, that *Rebecca Roberts* was not fit to travel; having an internal Complaint, that would endanger her Life: but with respect to *Mary Mitton* the only Evidence produced was the Affidavit of a Clergyman, stating her great Age, and infirm State.

Sir *Samuel Romilly*, Mr. *Bell*, and Mr. *Newland*, in support of the Motion.

Mr. *Benyon*, for the Defendant.

In the Case of *Palmer* v. *Lord Aylesbury* (a) the Precedent, upon which this Application is made, your Lordship did not mean to compel the Court of Law to read Evidence, which they would have considered inadmissible; but in that particular Case, to save the Expence of taking down the Record, permitted the Deposition to be read. That single Case of Exception will not induce the Court to direct this Ejectment to be tried by a new Rule of Evidence; and without a peremptory Order the Court of Law will not hear these Depositions; the Witnesses being alive. The Rule is laid down by Mr. *Peake* (b), taken from *Buller's Nisi Prius*, that, when it is proved, that the Witness is dead, or cannot be found, or, as has been said in *Buller*, has [illegible] the Way, the Deposition ought to [illegible] observe, that the

(a) 15 *Ves.* [illegible].

Evidence

Circumstances

1813. Corbett v. Corbett.

Circumstance last mentioned, though a good Ground for postponing the Trial, can hardly make the Deposition Evidence. If the Witness is alive, though bed ridden, a Court of Law will not permit the Deposition to be read, nor the Hand-writing of an attesting Witness to be proved. the general Rule, that, if living, he must be produced, admitting Exceptions certainly; as in the Instance of a Man transported: but this Court, in those excepted Cases preventing the Necessity of carrying down the Record, did not mean to relax the Rule of Law. The Order, as it appears to have been drawn up in *Palmer* v. *Lord Aylesbury*, is too extensive; and your Lordship will pause in making a new Rule of Evidence upon a purely legal Question: the Object of this Bill being merely to remove a Term for the Purpose of trying an Ejectment; not to have an Issue directed; which might admit greater Latitude This is no more than a Case of Illness; which the Rule of Law does not provide for; and one Physician swears, that by easy Journeys, and with Care, the Witness may be taken to *Shrewsbury*. The Order therefore must be confined to the Depositions of Witnesses, who are dead; or perhaps leaving the Question, what Depositions shall be read, to the Discretion of the Court of Law.

Sir *Samuel Romilly*, in Reply.

If the Rule of Law is, as it is represented, with regard to Persons absolutely incapable from Illness of attending, that, their Depositions cannot be read, as they may be capable of attending at some future Time, a Court of Equity ought to order the Deposition to be received as Evidence; as the Court, assuming the Jurisdiction, must take Care, that the Case shall be properly tried. There is no Rule, requiring Proof at the Trial of the Incapacity to attend; which would create the Expence of taking down

Professional

Professional Men, to be examined for [illegible] Purpose. Upon the same Principle of saving Expence, on which the Court interposes to prevent taking down the Record, it will, if satisfied, that the Witness is not capable of attending, or likely to be in that State, order the Deposition to be read: no Law compelling the gratuitous Attendance of a Witness for a Pauper. This Fact of Capacity would be decided, not by the Jury, but by the Judge; and this Court is equally competent upon these Affidavits to try the Question, whether this Witness can be safely taken down, or whether it will endanger her Life. The Practice of this Court to order Depositions of Witnesses dead, or unable to attend the Trial, to be read, was settled as long ago as the Time of *Charles* II. *Bellingham* v. *Pearson* (a), a Trial of the Custom of a Manor; and there is no Distinction in this Respect between an Issue and an Ejectment. In *Andrews* v. *Palmer* (b) the Complaint was of a temporary Nature.

1813.

CORBETT v. CORBETT.

The Lord CHANCELLOR.

In the Case of *Palmer* v. *Lord Aylesbury*, I believe, the Order was, that the Depositions of such Witnesses

(a) "*Bellingham* v. *Pearson*, 3d *February*, 1667. "Reg. Lib. A. folio 309. "Issue, directing the Parties to proceed to a Trial at Law upon the Custom, charged in the Bill; and if the Parties differ upon the Issue, then Sir *John* Cole, one of the Masters of the Court, to settle the same: and after the Trial had, the Equity of the Cause was reserved [illegible] further determined by the Court; and after the Trial had this Court will consider of Costs as there shall be Cause: and at such Trial either of the Parties may make Use of the Depositions of such Witnesses taken in this Cause, as shall be then dead, or cannot attend the said Trial." A similar Order was made in [illegible] v. [illegible], at the *Rolls*, [illegible]

(b) *Ante*, 21.

should

1813.
CORBETT v. CORBETT.

should be read as were proved at the Trial unable to attend (a). The Questions are, first, whether, supposing the Rule of Law to be such as it is represented, this Court takes away the Power of deciding, that, the Witness not being dead, his Evidence shall not be read: secondly, in what Terms this Court calls upon the Court of Law to permit the Deposition to be read: if in the Terms I have stated, confined to those, who should be proved at the Trial unable to attend, the Court does not, I believe, make the Order in such Terms, unless satisfied, that even at the Time of the Application there is a Probability, that such Proof will be given at the Trial.

I will make Inquiry as to the Rule at Law. If it is, that, unless the Witness is proved to be actually dead, the Deposition cannot be read, it would become this Court to consider, before it relaxed that Rule; and I should have found it very difficult to decide for admitting the Deposition of a Witness, who had fallen sick by the Way, according to the Passage in *Buller*, but that the Deposition of one, who was so ill as not to be able to set out, could not be received. It is very difficult to admit that Distinction. The Departure from the Rule of Law ought to be as small as possible; and upon an Application of this Kind the Illness ought to be such as to raise an Apprehension, that the Witness may be dead before the Trial. A Rule, that the Evidence should be received at the Trial without Examination into the State of the Witness, would not be wholesome; as though there might be no Hope of producing him in a Week, he might very probably be produced in a Fortnight. If a Court of Equity can go so far, and I believe it has frequently, as to direct, that upon a Proceeding at Law, which is a Part of its Proceedings, the Deposition of a Witness, who

(a) That was the Course taken in *Andrews v. Palmer*, *Ante*, 21.

cannot

cannot attend, shall be read, though without such Direction it could not be read at Law, it must depend upon a sound Discretion in each Instance, how far the Court is to depart from the strict Rule of Law; and though it would order in each Case an Examination before the Judge, whether the Witness could attend, the Consideration is very different as to acting upon that in a Case, where it is physically possible, that he may recover, and where there is no Hope of Recovery; as in the Instance of a Person of this Age, between whom and a Person of the Age of Forty, afflicted with the same Disorder, there is a wide Distinction. I apprehend, no Difficulty will be found in producing a vast Number of Instances of this Order to receive Depositions, modified upon sound Discretion whether the Question, that the Evidence shall be received, is to be determined upon the Application here or left to the Court of Law, must depend upon the Circumstances in each Case. In that Case of *Palmer* v. *Lord Aylesbury*, which had been long in Court, there was nothing, from which the Court had the Means of collecting absolutely, whether the Witness could attend

---

The Lord CHANCELLOR

March 12.

I am satisfied, that from a very distant Period the Course upon a Trial, or Issue, for establishing some Fact, to aid this Court in the Exercise of its Jurisdiction, has been to direct the Depositions to be read, if the Witnesses are unable to attend; and then it seems to me, though no Precedent has been produced, that it is perfectly absurd, when I am satisfied by the Affidavits, that the Examination with regard to the Ability or Inability to attend can have but one Conclusion, to impose upon the Party the Necessity of trying that Fact before the Judge below; who would try it, and not the Jury. Some of the Orders for reading the Depositions of Witnesses, who shall be proved unable to attend, have not the

 Words,

1813.
CORBETT
v.
CORBETT.

Words, "at the Trial." It is a strong Proposition, that a Person may attend, who is carried down with that extreme Care, that the least Omission may occasion Death; and the Affidavits satisfy me, that these Two Persons by Removal to *Shrewsbury* would incur a considerable Risk of Death. It is therefore proper to make the Order, that these Depositions shall be read: but I shall accompany that with a Direction, that, if the Defendant chooses to examine them upon Interrogatories in the mean Time, he shall be at Liberty to do so. The great Defect of this Course is, that the Party loses the Benefit of an Examination *vivâ voce:* and Examination upon Interrogatories comes nearest to it.

With that Qualification the Order was made, that the Depositions of these Two Witnesses should be read, and of such other Persons as should be proved at the Trial to be dead, or unable to attend.

1813.
LINCOLN'S
INN HALL.
Feb. 26.

KOCH, *Ex parte.*

The Rule, that on a written Undertaking to pay Money on a Day certain, or on Demand, Interest shall run from the Day, or Demand, without a Contract for it, not extended to the Case of a Surplus in Bankruptcy. Interest therefore subsequent to the Commission confined to Debts, carrying Interest by the Contract.

THIS Petition, presented by Creditors, who had proved Debts under a Commission of Bankruptcy against the *Exeter* Bank, stated, that the Bankrupts were at the Time of their Bankruptcy indebted to the Petitioners and other Persons on Bills of Exchange and

Promissory

1813.
KOCH,
Ex parte.

Promissory Notes, respectively carrying Interest: some of the Promissory Notes being drawn by the Bankrupts, payable at certain Days after Date, or Sight (a), and others for £5, and £1 each, payable to the Bearers, on Demand.

The Creditors having been paid Twenty Shillings in the Pound on their Debts, with Interest upon such as carried Interest to the Date of the Commission, and the Assignees having in their Hands a considerable Surplus, the Petition prayed, that the Petitioners, and the other Creditors under the Commission, whose Debts carried Interest, may be declared to be entitled to Interest accrued subsequent to the Commission; that it may be referred to the Commissioners to take an Account of all the Debts proved, carrying Interest, and that the Assignees may be directed out of the Surplus of the Bankrupt's Effects to pay such Interest.

Mr *Courtenay*, in support of the Petition, contended upon the late Case of *Lowndes* v. *Collens* (b), that a Contract to pay Money on Demand carries Interest from the Time of the Demand, whether that Contract is contained in a Promissory Note, or any other Instrument; that the Bankruptcy was equivalent to a Demand, and consequently

(a) These Notes, which are usual with Country Bankers, were in the following Form.

"Twenty-one Days after "Sight I promise to pay "*A.B.* or Bearer Ten Pounds "with Interest until Accept-"ance."

As to the legal Import and Effect of such an Instrument, which seem to involve Questions of considerable Difficulty, see the Observations of the *Lord Chancellor*, 15 *Ves.* 499, *Ex parte Leman.* The only Instance, in which such a Note appears to have been before a Court of Law, is *Holmes* v. *Kerrison*, 2 *Taunt.* 323.

(b) 17 *Ves.* 27.

1813.
Koch,
Ex parte.

quently Interest was due on the Notes subsequent to the Bankruptcy: none of the Instances, in which Interest was refused, applying to the Case of a solvent Estate.

Sir *Samuel Romilly*, and Mr. *Cooke*, for the Bankrupts.

The Consequences of an Order, made on the Ground, that Interest subsequent to the Commission shall be allowed in every Case, where the Law would give Interest, must be very extensive. One obvious Consequence would be, that the Bankrupt would pay more than if he had continued solvent; in which Case many of these Notes would have remained in Circulation without any Demand for many Years. The Novelty of such a Proceeding forms a strong Objection to it; and the Effect is an Alteration of the Practice, settled by Lord *Hardwicke*, that Interest shall not be calculated on a Debt, which does not by Contract carry Interest at the Time of the Bankruptcy (*a*): a Rule which has never been departed from. Though at Law Interest is frequently given for the Detention of a Debt, it is always in the Shape of Damages; which cannot be proved as a Debt; *Marlar Ex parte* (*b*). In the Case of *Bromley* v. *Goodere* (*c*) the Master was directed to compute Interest on the Notes carrying Interest upon the Face of them; whence is to be inferred, that there were Notes, that did not carry Interest.

(*a*) In addition to the Cases cited in the subsequent Part of the Argument, see *Morris, Ex parte*, 3 *Bro. C. C.* 79. *Champion, Ex parte*, 3 *Bro. C. C.* 436. *Hankey, Ex parte*, 3 *Bro. C. C.* 504, and *Mills, Ex parte*, 2 *Ves.* jun. 295. *Clark, Ex parte*, 4 *Ves.* 677. *Boardman, Ex parte* 1. *Cooke*, B. L. 184. *Reeve Ex parte*, 9 *Ves.* 588.

(*b*) 1 *Atk.* 150. See also *Craven* v. *Tickell*, 1 *Ves. jun.* 63.

(*c*) 1 *Atk.* 75.

terest. In *Ex parte Rooke (a)*, upon the Rule now set up Interest ought to have been calculated from the Time, not of the Report, but of the Bankruptcy. The Case of *Lowndes* v. *Collens* cannot be applied to a Surplus in Bankruptcy.

Mr. *Courtenay*, in Reply, admitting, that the Cases cited establish, that Interest shall not be calculated, where the Contract does not expressly provide for it, observed, that they proceeded upon the Uncertainty, what Interest might be due at the Time of the Bankruptcy: but the Course is now different: and the same Rule, which the Courts of Law and Equity adopt generally with regard to Interest, must prevail in Bankruptcy. The Interest in these Cases is due, not as Damages, but as a component Part of the Debt.

The Lord CHANCELLOR.

If there is any Contract for Interest, the Debt will carry Interest: but I have always understood the Rule in Bankruptcy, that Debts, carrying Interest, and no others, are in the Case of a Surplus, to have Interest subsequent to the Commission. It is very difficult to say, upon what Ground originally in Bankruptcy Debts, carrying Interest, were to have it out of the Surplus: as the Debt to be proved is the Principal and Interest due at the Date of the Commission; and the Principle of the Bankrupt Law is to pay the Debts proved, and nothing afterwards. The Court however has gone so far as to give subsequent Interest out of the Surplus with regard to Debts, carrying Interest by the Contract; which is the Expression of all these Orders. Damages are not Interest; and in the Cases at Law it has been considered as ascertained Damages; not as Interest, due by the Contract. It is

(a) 1 *Atk.* 244

better

1813. KOCH, *Ex parte.*

better to abide by the Rule, that has hitherto prevailed in this Case of a Surplus, than to introduce a new one; the Consequences of which it is not easy to foresee.

Take the Order in the same Words as in the Case of Sir *Stephen Evance (a)*, to compute Interest upon such Debts only as by the Contract carry Interest.

(a) Bromley v. *Goodere*, 1 *Atk.* 75

1813. LINCOLN'S INN HALL. *Feb.* 5.

READ, *Ex parte.*

Joint Creditors having taken out a separate Commission of Bankruptcy, proving, and voting in the Choice of Assignees, may afterwards join the Bankrupt in an Action as a Co-Defendant, upon giving a full Indemnity, undertaking to take no Advantage of the Verdict or Judgment against him, with Costs of the Petition.

A COMMISSION of Bankruptcy issued against the Petitioner in *August*, 1811, upon the Petition of *Matthias Attwood*, a joint Creditor of the Bankrupt, and *John Lea* and *Jonathan Corrie*, upon their joint Promisory Note for £3500; which Debt he proved under the Commission; having no other Demand against the Bankrupt; and voted in the Choice of Assignees *(a)*. In *January*, 1813, *Attwood* commenced an Action upon the Note against the Bankrupt jointly with *Lea* and *Corrie*.

The Petition prayed, that all Proceedings at Law in the Action, so far as regards the Bankrupt, might be stayed *(b)*, and that *Attwood* may pay the Costs at Law, and of this Application. A Motion was made in the Court of *Common Pleas*, that a *Noli Prosequi* should be entered as against the Bankrupt; but that Court declined interfering.

(a) *Ex parte Ackerman*, 14 *Ves.* 604. *Ex parte De Tastet*, 17 *Ves.* 247.

(b) See 49 *Geo.* 3. *c.* 121. s. 14.

Sir

Sir *Samuel Romilly*, in support of the Petition. 1813.

READ, *Ex parte.*

Mr. *Parker*, for *Lea*. Mr. *Benyon*, for *Corrie*.

Mr. *Heald*, for *Attwood*, stated, that the Bankrupt was a necessary, though a formal, Party; and, had the Plaintiff proceeded without joining him, the Defendants might have pleaded in Abatement, offering to indemnify the Bankrupt.

The Lord CHANCELLOR.

This Creditor's Proof under the Commission is an Election not to take any other Proceeding, meant to be effectual against the Bankrupt; but where it is necessary to join him in an Action for the Purpose of sustaining the Plaintiff's Right against other Parties, the Bankrupt is entitled both under the last Act of Parliament *(a)* and the Law, as it stood previously, to a full Indemnity, before the Plaintiff can proceed at Law.

The Order must be, that the Plaintiff at Law shall indemnify the Bankrupt against all the Expences of the Action, to whatever Point it may be carried, and shall not take Advantage of the Verdict or Judgment as against him, and the Plaintiff must pay the Costs of this Petition.

(*a*) Stat. 49 *Geo.* 3 c. 121.

TRIGWELL,

1813.
March 17.

TRIGWELL, *Ex parte.*

Commission of Bankruptcy superseded on Consent of the petitioning Creditor.

THIS Petition prayed, that a Commission of Bankruptcy, which had not been opened, might be superseded, with the Consent of the petitioning Creditor.

Mr. *Montague*, referring to *Ex parte Lanchester* (*a*) said, that though the *Lord Chancellor* would not stay the Proceedings without the Consent of the petitioning Creditor (*b*), with that Consent there could be no Objection.

Mr. *Heald*, for the petitioning Creditor, expressed his Consent.

The Lord Chancellor made the Order

(*a*) 17 *Ves.* 512.

(*b*) Though the *Lord Chancellor* will not stay the Declaration of Bankruptcy to which the Creditor is entitled under the Act of Parliament upon the Proof before the Commissioners, his Lordship will, upon Affidavit, denying the Act of Bankruptcy, or Debt, stay the Insertion in the *Gazette*, until the Proceedings are laid before him; and Applications for that Purpose are becoming frequent. See *Ex parte Fletcher, Post*, 350. Where the petitioning Creditor Consents, it seems proper, that the Ground of his Consent should be stated with reference to the Statute 5 *Geo.* 2. c. 30. s. 24. See *Ex parte Browne*, 15 *Ves.* 472.

ROSS

1813. LINCOLN'S INN HALL. *March* 11.

ROSS v. LAUGHTON.

Solicitor bound to produce Papers of his Client for him, or in case of his Bankruptcy for his Assignees, though not employed by them, in the Cause, for the Purposes of which he received them; but not bound without Payment to deliver them up, or produce them in any other Business.

IN 1812 a Decree was made for an Account against an Executor, with the usual Direction to produce all Papers, &c.

The Defendant having since become Bankrupt, his Assignees were incapable of proving his Discharge in the Master's Office, without certain Vouchers, which were in the Progress of the Cause previously to the Bankruptcy deposited by the Bankrupt with his Solicitor; whom the Assignees had not continued to employ. On the Part of the Assignee a Motion was made, that the Defendant, or his Solicitor, might produce, and shew to the Master, all such Vouchers, &c., in their Possession or Power, relating to Payments made by the Defendant, on account of the Estate of the Testator.

Mr. *Agar*, in support of the Motion.

Mr. *Parker*, for the Defendant's Solicitor, resisted the Motion, on the Ground, that the Assignees had not offered to pay his Bill.

The Lord CHANCELLOR made the Order; observing, that there was no Case, in which a Solicitor, receiving from his Client Papers in the Course of a Cause for the Purpose of doing Justice to such Client, had been suffered to refuse to produce them in that Cause; that this was an Application, not by the Client himself, but by those, cloathed with his Interest; and the Circumstance, that the Assignees had not employed the Solicitor, could make no Difference;

1813.
Ross
v.
Laughton.

Difference; but though the Solicitor could not refuse to produce Papers, delivered under the Circumstances of this Case, yet he might refuse to part with them, or to leave them in the Master's Office; and the Order, therefore, must be confined to producing the Papers in this Cause; not extending to delivering them over, or to the Production of them in any other Matter.

1813.
Lincoln's Inn Hall.
March 16.

FLETCHER, *Ex parte.*

Order under Circumstances restraining the Insertion in the *Gazette* of the Declaration of Bankruptcy, until the Proceedin[illegible] cellor.

THE Object of this Petition was to stay the Insertion of the Petitioner's Bankruptc in the *Gazette*, if the Commissioners should declare him a Bankrupt. The Petition stated, that the Commission was taken out on an Accommodation Bill, accepted by the Petitioner for the Accommodation of the petitioning Creditor; that Two Years had elapsed without any Demand made on the Petitioner; that the had committed no Act of Bankruptcy; was perfectly solvent; and on hearing of the Docket, had offered to deposit the Amount of the Bill. The Petition was supported by Affidavits of the Facts.

Sir *Samuel Romilly*, and Mr. *Wingfield*, in support of the Petition, admitting, that this was an unusual Proceeding, justified it under such Circumstances by the ruinous Consequences, which the Publication of Bankruptcy would produce.

The Lord Chancellor, being informed, that the Commission had not been opened, made an Order, that the Commissioners should proceed to open the Commission, but should not publish the Declaration of Bankruptcy, until his Lordship had inspected the Proceedings

The

The Petition from want of Time not having been regularly presented, his Lordship signed it in Court; and directed the Proceedings to be laid before him immediately upon the Declaration of Bankruptcy (a).

1813.
FLETCHER, *Ex parte.*

(a) See *Ex parte Foster,* 17 *Ves.* 414, 1 *Rose*'s Bank. Ca. 49, *Ex parte Lanchester,* 17 *Ves.* 512.

1813.
LINCOLN'S INN HALL.
March 19.

PATON *v.* ROGERS.

Reference of Title before Decree refused, where the Purchaser on other Grounds resisted Performance of the Contract. Though it is generally, not universally, true, that a Purchaser may take what he can get with Compensation for what he cannot have, whether that is ever done without express Undertaking on his Part to do what the Court shall order *Quære.*

THE Bill prayed a specific Performance of a Contract for the Sale of an Estate by Assignees under a Commission of Bankruptcy to the Defendant, and an Injunction against proceeding at Law to recover the Deposit.

The Answer set up Objections to the Title; Delay in compleating the Purchase: Deficiency in the Quantity of Land, as stated in the Particular: submitting, that if a good Title could be made, the Defendant ought not to be compelled specifically to perform a Contract, into which he was led by an incorrect Particular, and Misrepresentation; and denying, that the Agreement was fair.

The Injunction being continued after the Answer came in, a Motion was made by the Defendant, that the Plaintiffs may pay into Court the Deposit, paid by the Defendant; and that an Inquiry may be directed, whether the Plaintiffs

can

1813. PATON v. ROGERS.

can make a good Title to the Premises, or to any Part of them; and whether they had a good Title on the Day of their entering into the Contract *(a)*, or at the Time of filing the Bill: such Inquiry to be without Prejudice to every Claim, to which the Defendant may be entitled for Compensation.

Mr. *Hart*, and Mr. *Owen*, in support of the Motion, mentioned *Balmanno* v. *Lumley (b)*.

Sir *Samuel Romilly*, and Mr. *Roupell*, for the Plaintiffs.

The Lord CHANCELLOR.

The general Rule is, as I see it stated in *Blyth* v. *Elmhirst* (c), that where the Record raises merely the Question of Title, or, where it is agreed at the Bar, that there is no other Question, the Court will immediately direct a Reference to the Master upon the Title; following the first Decision upon that Point by Lord *Rosslyn* (d): in that Sort of Case both Parties agreeing, that, if there is a good Title, there ought to be a specific Performance; and the Parties supply what stands at the Head of every such Decree, a Declaration, that the Contract ought to be specifically performed; and then a Direction to the Master to look into the Title: but, if the Record furnishes the Question, whether there ought to be a specific Performance, the Court does not give that Reference; as upon other

(a) That a Vendor, not having a Title at the Date of the Contract, shall have a specific Performance, if he procure a Title before the Report, see *Mortlock* v. *Buller*, 10 *Ves.* 315, *Wynn* v. *Morgan*, 7 *Ves.* 202.

(b) *Ante*, 224.

(c) *Ante*, 1

(d) *Moss* v. *Matthews*, 3 *Ves.* 279.

1813.

PATON
v.
ROGERS.

other Circumstances a Question is made, whether, even if there is a good Title, there should be a specific Performance. As to the Question of Compensation *(a)* it is true generally, but not universally, that the Purchaser may take what he can get with Compensation for what he cannot have *(b)*; and I doubt, whether that is ever done except, where there is an express Undertaking on his Part to do what the Court shall order; which, perhaps, may distinguish the Case that has been mentioned.

The Deposit was ordered to be paid into Court; and the rest of the Motion was refused.

(a) As to Compensation generally, see *Calcraft* v. *Roebuck*, 1 *Ves.* 221, *Guest* v. *Homfray*, 5 *Ves.* 818, *Drewe* v. *Hanson*, 6 *Ves.* 675, *Drewe* v. *Corp*, 9 *Ves.* 368, *Mortlock* v. *Buller*, 10 *Ves.* 306, *Dyer* v. *Hargrave*, 10 *Ves.* 505, *Halsey* v. *Grant*, 13 *Ves.* 73, *Hornyblow* v. *Shirley*, 13 *Ves.* 81, *Alley* v. *Deschamps*, 13 *Ves.* 228, *Browne* v. *Warner*, 14 *Ves.* 413, *Milligan* v. *Cooke*, 16 *Ves.* 1, *Todd* v. *Gee*, 17 *Ves.* 273.

(b) See *Mortlock* v. *Buller*, 10 *Ves.* 316.

1813.
Lincoln's
Inn Hall.
March 27.

DE MANNEVILLE *v.* CROMPTON.

Marriage Settlement of personal Property in general Terms, "all "Monies, "Debts, Bills, "Bonds, "Notes," &c. No Inference of Fraud from the Cancellation during the Treaty, upon a fair, moral Consideration, of a Note, the only Instrument of that Description: the Marriage not taking place upon a Representation of the Particulars or Amount.

Discretion of Trustees, having Power to change Securities, but not without Consent, not controuled, unless mischievously and ruinously exercised.

THE Bill stated the Marriage of the Plaintiff on the 21st of *April*, 1800, with *Margaret Crompton;* and that by the Marriage Settlement, dated the 2d of *April*, 1800, reciting, that *Margaret Crompton* was possessed of, or entitled to, a considerable personal Estate, Part whereof was secured to her by "Mortgages, Bonds, "Notes, and other Securities," and that it was proposed, that "all and singular the said personal Estate of the "said *Margaret Crompton*" should be assigned and vested in the Defendants *Ann Crompton* and *Edmund Haworth* upon the Trusts after mentioned, it was witnessed, that in Consideration of the said intended Marriage, &c. *Margaret Crompton* with the Consent of the Plaintiff assigned unto *Ann Crompton* and *Haworth* "All and singular the Monies, Debts, Bills, Bonds, "Notes, and other Securities for Money, Chattels real "and other Chattels and personal Estate," of *Margaret Crompton*, to hold to such Uses, &c. as she should appoint, and for want thereof then for her sole and separate Use; with Limitations over, by which the Husband took a partial, contingent, Interest, (*a*); and a Power to the Trustees, but not without the Consent in Writing of Mrs. *De Manneville*, to call in any of the Securities, and make Sale from Time to Time, and to re-invest the Money upon the same Trusts.

The Bill farther stating, that among the Property to which Mrs *De Manneville* was entitled, was a Pro-

(*a*) See *De Manneville* v. *De Manneville*, 10 *Ves.* 52.

misory

1813. DE MANNEVILLE v. CROMPTON.

misory Note for £2000 by her Mother *Ann Crompton*, the Trustee, for valuable Consideration, which Note had been cancelled and destroyed either by the Trustees or Mrs. *De Manneville*, who had ceased to live with her Husband, and that other Property was out upon hazardous Security, prayed an Account of the personal Estate, which *Margaret De Manneville* was interested in or entitled to at the Time of making the Settlement; and that in taking the Account *Ann Crompton* may stand charged with the Sum of £2000, in which she was so indebted to her Daughter, &c.

The Answer of the Trustees and Mrs. *De Manneville* represented, that the Note for £2000 was given Seventeen Years ago by Mrs. *Crompton*, without any Consideration, at the Instance of her Brother, as some Provision in case of her second Marriage for her Daughter; whose Fortune at that Time was inconsiderable: but Mrs. *De Manneville* about a Year before her Marriage, whether before or after the Instructions for the Settlement, or while the Marriage was in Contemplation, the Defendants could not recollect, having acquired a large Accession of Fortune, without the Desire or previous Knowledge of her Mother brought the Note, and burnt it before her.

Mr. *Richards*, and Mr. *Bell*, for the Plaintiffs.

Sir *Samuel Romilly*, and Mr. *Agar*, for the Defendants.

The Lord CHANCELLOR.

This is a Case of Importance in Two Views of it: first, I should be very unwilling to relax a Principle, which has long prevailed both at Law and in Equity; that, if a

Material Representation in the Circumstances of a Person, contracting Marriage, made good even at the Instance of Persons concerned in fraudulently defeating such Representation.

1813.

De Manneville v. Crompton.

Representation is made upon the Circumstances of a Person about to form a Connection in Marriage, and that Representation is of such a Nature, that, if not made good, or if varied, it will materially affect the Circumstances in Life of that Party, Courts both of Law and Equity will hold the Party bound to make good that Representation, even at the Suit of Individuals, concerned in fraudulently defeating such a Representation, upon which that Connection was proceeding (a). It is however, of equal Importance, that this should not be carried to the Extent, that, whenever any thing occurs in general Treaty, not entering into Particulars, or shewing, that the Marriage actually took place upon such Representation, that Principle is to be applied to a Case, to which it has no Application, and was never intended to be applied.

With these general Observations I come to the Consideration of the Question, whether the Defendant, the Mother of Mrs. *De Manneville*, is bound to bring into the Fortune of her Daughter a Sum of £2000, represented as due to her from the Mother at the Commencement of the Treaty of Marriage. The Marriage appears to have been in Contemplation from *January*, 1799, when Instructions were given for the Settlement, to *April*, 1800, when the Marriage took place. All the personal Property of Mrs. *De Manneville* was to be included; and the Settlement is an Assignment of that personal Estate to Two Trustees, one of whom is the Mother. Whatever the Parties might have understood, it could hardly have been in the Contemplation of any of the professional Gentlemen consulted, that a Note was to be assigned to the Debtor in that Note, as a Trustee to sue herself. There is no Evidence or Admission, that any

(a) *Neville* v. *Wilkinson*, 1 *Bro. C. C.* 543.

Representation

Representation was ever made to the Plaintiff farther than that it was in Contemplation, that whatever was the real or personal Property of the Lady would be the Subject of Settlement. There was no Representation of what Particulars it consisted, or of the actual Amount: nor is there any Recital, that particular Property should be settled, except the Word "Notes" occurring in the plural Number; and there is no Note, unless this Note for £2000 was intended. When we are fixing Fraud upon a Party, it would be a vast deal too much from the mere Circumstance, that this Word occurs in a general Description of all the personal Estate, without any specific Representation, and that there is no Note found among the Particulars assigned, to infer Fraud. If she had changed her Securities in the Course of the Treaty, and at the Conclusion of it there had been no Bond, but many Notes, the Settlement must have operated upon all the Estate, of which at that Time she was seised and possessed; comprehending all personal Estate, whether falling within any particular Description, or not; whether that Description was, or was not applicable to any one Item. It is therefore too much from the mere Circumstance, that no Note happens to be found among the Particulars of the personal Property, though the Word "Notes" is in the Deed, to take that as a Ground for imputing Fraud: though there was no particular Conversation as to the Nature of any one Security; and the Settlement was prepared upon the Suggestion, that it would be inconvenient to describe or schedule the Particulars; and therefore the Property was to be taken in the gross.

The Representation by the Answer is, that this Note was not given for valuable Consideration, and payable in all Events, but that, Mrs. *Crompton* being a young Widow, her Brother, considering, that she might marry again, represented to her, that she should make some

 Provision

1813. DE MANNEVILLE v. CROMPTON.

Provision for this Child in the Event of another Marriage; and under that Recommendation this Note was given without Consideration, and only in the Event of another Marriage. That would not vary the Question, if, though payable upon a Contingency, it was Part of the Property, with reference to which the Representation was made. The Contingency would affect its Value: but whatever it was, it would be bound by that Representation.

The Answer farther represents, that Mrs. *De Manneville*, feeling, that she ought not to insist upon it, destroyed this Note: with regard to the Time, it is extremely difficult to say with positive Certainty, when it was destroyed: but if it depended on that, there is sufficient Ground for a judicial Opinion, that it was really given up after *January*, 1799; when Instructions for the Settlement were given; and the true Question is, whether there is sufficient Evidence in the Nature of the Transactions from *January*, 1799, to *April*, 1800, of a Representation, and Assurance, (for it must amount to that), that the personal Estate, as it stood at the Commencement of that Period, whatever its Amount, should in no Way be diminished, if the Marriage should take place. Unless there is clear Evidence of that, the Settlement itself must be the Rule.

Upon that Principle my Opinion is, that the Marriage was not upon any Representation as to the Amount of the Property in *January*, 1799; that it should be in no Way diminished; or that this Note should make Part of the Settlement; and I should go beyond any Precedent by holding, that here was a Representation leading to Marriage, which was either fraudulently or substantially defeated by what took place afterwards with reference to the

the Note. No Relief is therefore due with regard to the Note.

1813, DE MANNEVILLE v. CROMPTON.

As to the general Ground of the Bill, this is a Case, upon which it is not within the Province of a Court of Equity to interfere; depending upon this. If there are Trustees authorized to lay out Money upon Government or real Securities, or personal Property, the Court in many Instances will say, they shall choose that, which is best. If personal Property is out upon hazardous Securities, which is charged in this Bill, but positively denied, there is no Doubt, that Trustees would be controuled by the Court; and even their Discretion in such a Contract as this, would be controuled, if that Discretion was shewn to be mischievously and ruinously exercised. One Distinction between Courts of Law and Equity is this: the Court of Law has before it the Parties interested: but it is frequently the Interest of all the Parties before a Court of Equity to have a Decree against some one, who is not before the Court. In this Case the Plaintiff's Construction is the safest: but upon the whole of this Deed, containing a Proviso, that the Trustees shall call in any of the Securities, but not without the Consent of Mrs. *De Manneville*, why, settling her own Property on Marriage, may she not stipulate, that they shall not call in Money without her Consent in Writing; and if that is the Contract, what Authority has a Court of Equity to strike it out of the Settlement? That Stipulation therefore being in the Settlement, upon the general Ground the Bill must be dismissed without Costs.

1813.
LINCOLN'S
INN HALL.
Feb. 26.

RIDGE, *Ex parte.*

A Farmer, making Lime from a Lime-pit, opened and worked before the Commencement of his Term, and selling the Surplus beyond what he required for Manure, is not a Trader within the Bankrupt Laws.

THIS Petition was presented by a Bankrupt to supersede the Commission, on the Ground, that the Petitioner was not a Trader. The Affidavits in support of the Petition stated, that for upwards of Fifteen Years previous to the Commission the Bankrupt under a Lease occupied a Farm; on which at the Time he entered there was a Lime-pit; which had been opened and worked by former Occupiers; that after he so entered he from Time to Time dug up the Lime-stone, and converted the same into Lime with Materials, purchased by him for that Purpose, using Part of the Lime for the Purpose of manuring his Farm; and disposing of such Quantities of the Lime, so made by him, as were not wanted for the Purposes of his Farm, to other Persons; and that he did not seek his Livelihood by making and selling Lime; nor did he take the Farm for that Purpose; and he did not exercise or carry on any Trade or Business save that of a Farmer.

Mr. *Leach*, Mr. *Cullen*, and Mr. *Parker*, in support of the Petition.

This Case falls within the Principle of *Newton* v. *Newton*(a). This is not the Case of a Person, taking the Lime Rock for the Purpose of Sale: it is Part of his Farm: he uses the Lime, that is made from it, to manure his Farm; and sells the remainder. The Question, which has been the Subject of much Doubt, whether a mere

(a) 1 *Co.* Bankrupt Laws, 57. (Ed. 1804.)

Lime-burner

Lime-burner is a Trader within the Bankrupt Laws, does not arise here. as this Petitioner is a Farmer selling a surplus Commodity: nor does it make any Difference, that he sells that Surplus to any one indiscriminately.

1813.

RIDGE, *Ex parte*.

Sir *Samuel Romilly*, for the petitioning Creditors, admitted, that though this Case never had been decided *in Specie*, it fell within the general Rule; and was not to be distinguished from *Sutton* v. *Wesley (a)*, and the other Cases on Brick-making and Allum-works.

The Lord CHANCELLOR said, this Case could not be distinguished: and therefore the Commission must be superseded.

The Commission was superseded with Costs.

(a) 7 *East*. 442.

1813.
LINCOLN'S INN HALL.
March 26.

TREFUSIS *v*. CLINTON.

A Re-sale on opening Biddings producing a considerable Increase of Price no Ground for Costs to the Person, who opened the Biddings.

AFTER the Sale of an Estate before the Master the Biddings were opened; and, the Re-sale having produced upwards of £3000 more, a Motion was made by the Person, who had opened the Biddings, for the Return of his Deposit, and a Reference to the Master to tax his Costs, incurred in opening the Biddings, and the Re-sale, and of this Application, and incidental thereto, as between Solicitor and Client, and that, when taxed, such Costs may be directed to be paid by the Purchaser out of the Purchase-money.

Sir

1813.
TREFUSIS
v.
CLINTON.

Sir *Samuel Romilly*, in support of the Motion, observing, that the Return of the Deposit was of course, claimed the Costs on the Ground of the Benefit produced by opening the Biddings.

Mr. *Heald* resisted the Motion.

The Lord CHANCELLOR, granting the Motion, so far as it applied to the Return of the Deposit, refused it as to the Costs, as contrary to the Practice (*a*).

(*a*) *Rigby* v. *M'Namara*, 6 *Ves.* 466. *Earl Macclesfield* v. *Blake*, 8 *Ves.* 214; but where the Biddings have been opened for the express Object of Benefit to the Family, Costs are allowed. *Owen* v. *Foulkes*, 9 *Ves.* 348. *West* v. *Vincent* 12 *Ves.* 6.

1813.
LINCOLN'S
INN HALL.
Feb. 26.

WESTBEECH *v.* KENNEDY.

In proving the Execution of a Devise actual Signature by the Devisor in the Presence of the Three subscribing Witnesses not required, if he declares it to be his Will before those, who did not see him sign; and separate Attestations sufficient.

IN a Suit, instituted for the Execution of the Trusts of the Will of *Joseph Westbeech*, devising real Estate, a Question arose, whether the Will was duly executed according to the Statute of Frauds (*a*).

Richard Emmerson, one of the Three subscribing Witnesses, deposed, that the Testator produced the Will, and "did in the Presence and Hearing of this Deponent "seal the same and publish and declare the same as his "last Will," *Henry Dimock*, one other of the subscribing Witnesses being present; the Deponent not recollecting with Certainty, whether the Testator and *Henry Dimock*

(*a*) Stat. 29 *Ch.* 2. c. 3.

did

did sign in his Presence; though he believed their Names subscribed to be of their Hand-writing.

1813.

WESTBEECH v. KENNEDY.

Henry Dimock deposed, that he saw the Testator duly sign, seal and publish his Will; that *Richard Emmerson* was present, and that he subscribed his Name in the Presence of this Deponent.

Henry Boys, the third subscribing Witness, deposed, that he was sent for to be a Witness to the Will of the Testator: that upon his attending the Testator did produce the Will to "this Deponent, and request him to be "a Witness thereto; and he the said *Joseph Westbeech* "did also at the same Time seal the said produced "Paper-writing, and publish and declare the same as "and for his last Will and Testament in the Presence "and Hearing of him this Deponent. but the said *Joseph* "*Westbeech* did not sign the same in the Presence of him "this Deponent · such produced Paper-writing appear-"ing to have been signed by him the said *Joseph West-"beech*, and also by *Henry Dimock*, and *Richard Em-"merson*, whose Names now appear to be set and sub-"scribed to the said produced Paper-writing, as two of "the Witnesses thereto, prior to this Deponent's attend-"ing him the said *Joseph Westbeech*, as aforesaid."

Boys also stated, that he believed the Hand-writing subscribed to be the Testator's, having often seen him write; and that, when he this Deponent subscribed his Name as a Witness, no other Person was present.

Sir *Samuel Romilly*, and Mr. *Parker*, for the Plaintiff's, contended, that it was not necessary, that the Three Witnesses should be together present at the Execution of the Will, nor that they should see the Testator sign, if he recognized

1813. WESTBEECH v. KENNEDY.

recognized the Signature as his; relying on *Lemayne* v. *Stanley* (a), *Jones* v. *Lake* (b), *Warneford* v. *Warneford* (c), *Smith* v. *Evans* (d), *Dormer* v. *Thurland*(e), *Grayson* v. *Atkinson* (f), and *Stonehouse* v. *Evelyn* (g).

Mr. *Hart*, and Mr. *Perry*, for the Defendants.

The Lord CHANCELLOR made the Decree, as prayed.

(a) 3 *Lev.* 1.
(b) 2 *Atk* 176. (in Note) and 2 *Ves.* 455. S. C.
(c) 2 *Str.* 764.
(d) 1 *Wils.* 313.
(e) 2 *P. Wms.* 509.
(f) 2 *Ves.* 454.
(g) 3 *P. Wms.* 252. See also *Ellis* v. *Smith*, 1 *Ves.* jun. 11. *Addy* v. *Grix*, 8 *Ves.* 504. *Cook* v. *Parsons.* Prec. Ch. 184. *Anon*, 2 Ch. Ca. 109 *Shires* v. *Glascock*, *Salk.* 688. *Croft* v. *Pawlet*, 2 *Stra.* 1109. *Longford* v. *Eyre*, 1 *P. Wms.* 740. *Carleton* v. *Griffin*, 1 *Burr.* 549. *Right* v. *Price*, *Doug.* 229. *Cassan* v. *Dade.* 1 *Bro.* Ch. Ca. 99, and *Gryle* v. *Gryle*, 2 *Atk.* 176.

1813. LINCOLN'S INN HALL. *March* 4.

APREECE v. APREECE.

Legacy of £50 for a Ring not specific: therefore carrying Interest with other pecuniary Legacies.

SHUCKBURGH Ashby Apreece bequeathed unto *Robert Farquhar*, and his Wife, the Sum of £50 each for a Ring.

Under the usual Direction to compute Interest on such of the Legacies as carried Interest the Master had not allowed any Interest on these Legacies, considering them in the Nature of specific Bequests, and amounting to the same as if the Testator had bequeathed the Rings themselves.

A Motion

1813.
APREECE
v.
APREECE.

A Motion was made for Liberty to except to the Master's Report for not allowing Interest on the Two Legacies.

Mr. *Agar*, in support of the Motion, contended, that there was no Ground for considering the Legacies as specific: and therefore Interest must be computed on them.

Mr. *Shadwell*, for the Defendant, admitted, that he had not discovered any Authority for a Distinction between a Legacy of £50 for a Ring, and a Legacy of £50 simply.

The Lord CHANCELLOR clearly held, that these Legacies were not specific (*a*); and that the Legatees therefore were entitled to Interest within the Terms of the Decree.

(*a*) Most of the Cases on specific Legacies, and the Distinctions upon the Subject will be found in Mr. *Cox's* Notes to *Hinton* v. *Pinke*, 1 *P. Wms.* 539, and *Rider* v. *Wager*, 2 *P. Wms.* 328. Mr. *Raithby's* Note to *Brown* v. *Allen*, 1 *Vern.* 31; Mr. *Sanders's* Notes to *Purse* v. *Snaplin*, 1 *Atk.* 414, and Mr. *Fonblanque's* Note, 2 Treat. Eq. 369. See also *Gillaume* v. *Adderley*, 15 *Ves.* 384, referring to the late Cases.

BISHTON

1813.
LINCOLN'S
INN HALL.
March 3. 14.
16.

An Answer filed is a sufficient Objection to a Motion to extend an Injunction to stay Trial; but, as the Defendant submitted to Exceptions, the Order was made: an insufficient Answer being no Answer.

BISHTON *v.* BIRCH.

THE common Injunction having been obtained, for want of Answer, to stay Proceedings at Law, the Plaintiff moved, that the Injunction might be extended to stay Trial, on Affidavit, that he verily believed he could not with safety proceed to Trial, until the Defendant should have put in his Answer; and that a Discovery would arise out of the Answer, so as to enable him to make a good Defence to the Action.

Sir *Samuel Romilly*, Mr. *Hart*, and Mr. *Fisher*, in support of the Motion.

Mr. *Heald*, for the Defendant, objected, that the Answer had been filed that Morning; and produced the Six-Clerk's Certificate.

Sir *Samuel Romilly*, in Reply, contended, that the Answer, filed since the Notice served, and immediately before the Motion was made, could form no Objection; the Plaintiff not having an Opportunity of seeing, whether it was a sufficient Answer; and that such a Practice, permitting a Defendant to defeat the Motion by an Answer of a few Lines, extremely insufficient, for which there is no Authority, would be attended with great Inconvenience.

The Lord CHANCELLOR said, he would inquire into the Practice.

March 14. 16. Afterwards, before the Motion was decided, several Exceptions were filed; to which the Defendant immediately submitted; and put in a farther Answer.

Upon

1813.

BISHTON
v.
BIRCH.*

Upon these Facts the Motion was renewed; the Plaintiff insisting, that his Right to have the Injunction extended was clear by the Admission.

Sir *Samuel Romilly*, Mr. *Hart*, and Mr. *Fisher*, for the Plaintiff, insisted, that it was now put out of all Doubt, that the former Answer was insufficient; and an insufficient Answer is always considered as no Answer.

Mr. *Heald*, for the Defendant, contended, that in determining this Motion the subsequent Circumstances could not be taken into the Consideration.

The Lord CHANCELLOR said, that the Court, being informed of the Circumstances relating to the farther Answer, must take Notice of them, and give them their due Weight in deciding upon the Motion to extend the Injunction; that by the Practice of the Court the Fact of an Answer filed was a sufficient Objection to such a Motion: but the Defendant having submitted to Exceptions, and put in a farther Answer, and an insufficient Answer being no Answer, the motion must now be decided, as if no Answer had been put in; and therefore, the Injunction must be extended to stay Trial.

The Order was made accordingly (a).

THE

(a) *Ex Relatione*, Mr. *Fisher*. The following Case was produced from the *Register's* Book:

The GOVERNOR *and* COMPANY *of the* ROYAL EXCHANGE ASSURANCE *v.* BARKER.

14th *Dec.* 1737.—The Plaintiffs obtained the common Injunction to stay the Defendant's Proceedings at Law until Answer, Clearance of Contempt, and farther Order.

3d *Feb.* 1738.—The Defendant not having put in his Answer, the Plaintiffs on this Day,

1813.
Lincoln's Inn Hall.
March 17.

THE ATTORNEY GENERAL v. FINCH.

Notice of Motion to dismiss the Bill for Want of Prosecution. Three Terms having elapsed after Answer without Replication, not necessary; nor the Six-Clerk's Certificate on the Motion, if produced to Register, when the Order is drawn up.

THE Answer having been filed on the 28th of *May*, 1812, and no farther Proceedings having taken place in the Cause, the Defendants obtained the usual Order on the 20th of *February*, to dismiss the Bill for Want of Prosecution: but their Clerk in Court refused to procure the Six Clerk's Certificate; as no Note had been given to the Plaintiff of the Intention to dismiss the Bill, and that, therefore, it was contrary to the Practice in the Office. On the 24th of *February* an Order was made, that the Defendant's Clerk in Court

Day being a *Saturday*, moved, that the Injunction might extend to stay Trial. The Defendant's Counsel stated, that the Answer would be put in on *Monday*; upon which the Court did not make any Order.

6th *Feb.* 1738.—The Defendant's Answer not having been put in, the Plaintiff again moved the Court on this Day that the Injunction might extend to stay Trial; which, upon hearing an Affidavit of Notice of Motion to the Defendant read, was ordered accordingly.—Reg. Lib. B. 1738, fo. 169.

12th *Feb.* 1738.—The Defendant having put in his Answer, applied to the Court this Day, to discharge the Order of the 6th *February*, extending the Injunction to stay Trial; and the Court upon hearing Counsel for the Plaintiffs and the Defendant's Answer read, ordered the Injunction to extend to stay Trial to be discharged.—Reg. Lib. B. 1738. fol. 244.

13th *Mar.* 1738.—From the Registrar's Minute Book it appears to have been stated to the Court, that Exceptions were taken to the Answer; but the Exceptions were afterwards on the Plaintiff's Motion withdrawn on Payment of Costs.

should

should procure the Certificate: but, before it was obtained, on the 25th of *February* a Replication was filed.

A Motion was made by the Defendants, that the Replication may be withdrawn, and the Bill dismissed with Costs for want of Prosecution as of the 20th of *February*; and that the Relators, or the Defendant's Clerk in Court may pay the Costs.

Sir *Samuel Romilly*, and Mr. *Beames*, in support of the Motion.

That Rule of Practice, which entitles a Defendant to dismiss the Bill, if Three Terms have elapsed without any Step taken by the Plaintiff (a); cannot now be disputed; and few Rules have a more salutary Effect by limiting the Period of vexatious Delay. The Question is, whether the Defendants, being within the Terms of the general Rule, and having obtained the Order to dismiss, shall be detained in Court by a Replication, filed after that Order was obtained. The Bill was virtually out of Court the Moment the Order was pronounced; the Order being the efficient Proceeding; and the Act of drawing it up being merely for the Purpose of recording it, and giving Authority for the subsequent Proceedings for Costs. This is confirmed by the Manner, in which the Books of Practice speak of the different Modes of meeting a Motion to dismiss; which are Three: filing a Replication; moving to amend, and undertaking to speed the Cause (b). It is true, this Order was obtained in the

(a) 1 *Prax. Alm.* 34. 2 *Harrison's* Pract. 605. Pract. Reg. 178. *Turner's* Pract. 226. *Newland's* Pract. 106.

(b) *Newland's* Pract. 107. 109.

1813. The ATTORNEY GENERAL v. FINCH.

present Case without producing the Six-Clerk's Certificate: but by the modern Practice that is unnecessary, when the Motion is made; and it is sufficient, if the Certificate is produced to the *Register*, before the Order is drawn up; although not obtained, when the Order was made; as decided by your Lordship after mature Consideration in *Wills* v. *Pugh* (a), followed by *M'Mahon* v. *Sisson* (b).

Mr. *Johnson*, for the Relators.

The Lord CHANCELLOR declared, that the Practice does not require a Defendant to hand over to the Plaintiff a Note of his Intention to dismiss the Bill; that the Courtesy, as it is termed, among the Clerks in Court, is not wholesome; being in direct Opposition to a general Rule of Practice, laid down by the Court (c); that the Practice to move without producing the Certificate is established in the Two Cases cited: the Defendant moving on his Title to have that Certificate; and producing it, when the Order is to be drawn up: a Practice too long settled to be now altered: that, the Defendants therefore having a clear Right to the Certificate in this Instance, this Application must be granted with Costs, to be paid by the Relators.

Afterwards, upon the Suggestion, that the Omission to file the Replication was a mere Slip, it was ordered that the Replication should not be withdrawn; but the Information was retained, the Relators paying all the Costs.

(a) 10 *Ves.* 403.

(b) 12 *Ves.* 465. *Browne* v. *Byne*, *Ante*, 310.

(c) *Jackson* v. *Purnell*, 16 *Ves.* 204. and the References in the Note (a).

DICK

1813.
LINCOLN'S INN HALL.
March 30.
April 15.

DICK *v.* SWINTON.

Writ of *Ne exeat Regno* discharged with Costs; having issued against the Captain of an *East-India* Ship, when just sailing for *India* after a considerable Residence in this Country

IN *March* 1804, the Defendant, as Captain of an *East India* Merchant Ship, and *William Dick*, as Purser, being about to sail to the *East Indies*, agreed to be jointly interested in the trading Adventures, Freight, Tonnage, Passage Money, and Profits, to which they would be entitled, as Captain and Purser, during the Voyage, in the Proportions of Four-fifths to *Swinton*, and One-fifth to *Dick*. In *April*, 1806, *Dick* died intestate, and unmarried. A Bill, filed by his Administrators, prayed an Account, and the Writ of *Ne exeat Regno*; and the Motion for the Writ was supported by an Affidavit, that the Defendant was at the Decease of *William Dick* indebted to him in the Sum of £1000 at least on account of the Monies, received by the Defendant in respect of the Adventure, &c. stating the Belief of the Deponent, that the Defendant was about to leave *England*, and to proceed to the *East Indies*, or some other Parts beyond the Seas, being appointed Captain of the *Carnatic East-India-Man*; and was preparing to sail in a few Days.

Mr. *Sidebottom*, in support of the Motion.

The Lord CHANCELLOR inquired as to the Nature of the Trade; whether it was a legal Trade; and whether the Dealings were such as were allowed to be carried on by the *East-India* Company; requiring the Deponent to add to the Affidavit, that the Dealings and Transactions were, as he believes, legal.

The

1813.
DICK,
v.
SWINTON.

The Affidavit was accordingly amended; stating farther the Belief of the Deponent, that the Trade, so agreed to be carried on by *William Dick* and the Defendant, and which was afterwards so carried on by them, was a legal Trade, and not prohibited by the Laws of this Country, or the Charters or Regulations of the *East India* Company. Upon that Affidavit the *Lord Chancellor* granted the Writ; ordering it to be indorsed for £1000.

April 15.

A Motion was made to discharge the Writ of *Ne exeat Regno* under the Circumstances, stated by the Answer; that the Account had been settled by a common Agent; leaving a Balance against the Defendant of £391; and, the Defendant having been several Months in *England*, the Bill was filed, and the Writ obtained, just as he was sailing from the River as Captain of an *India* Ship in the usual Course. The Ship being at *Gravesend*, he obtained Leave from the *East India* Company to permit another Captain to navigate her to *Portsmouth*, and coming to Town, put in his Answer; submitting to pay into Court the Balance of £391.

Sir *Samuel Romilly*, and Mr. *Cooke*, in support of the Motion, observing, that this Writ is a most powerful Instrument, contended, that such an Application of it was an Abuse, that ought to be marked with Costs: the Defendant having been so long in this Country without any Attempt to enforce this Demand until the Instant of his Departure in the usual Course as Captain of an *Indiaman*; when it was notorious, that he could not be detained without absolute Ruin; and must therefore submit to the Terms imposed; and farther insisting, that this Writ was improperly applied to such a Departure from this Country for a temporary Purpose without a View to permanent Residence abroad.

Mr.

Mr. *Hart*, for the Plaintiffs, maintained their Right to this Writ upon the Affidavit of an equitable Debt, and their Belief, that the Defendant was leaving the Country.

1813. D— v. SWINTON.

The Lord CHANCELLOR.

I quite agree, that this Writ is a most powerful Instrument; and I never apply it without Apprehension. This Court has made Use of this great prerogative Writ for the Purpose of holding a Man to what is called equitable Bail. Upon this Application I have no Doubt; having frequently observed the Difference in the Practice of the Courts of *King's Bench* and *Common Pleas*. In the *King's Bench*, if a Plaintiff swore to any Debt, however large the Amount, the Defendant was arrested; and obliged to find Bail for that Sum I believe, they have lately altered that Practice: but the Court of *Common Pleas*, when I was Chief Justice, always entered into the Propriety of the Affidavit; and reduced the Bail accordingly. So this Writ has been modelled upon the View, which the Court has taken upon the Answer as to the Sum, for which the Defendant ought to be held to Bail.

Writ of *Ne exeat Regno*, a great prerogative Writ, applied to the Purpose of equitable Bail.

Practice of the Court of *Common Pleas* to examine the Affidavit to hold to Bail, reducing the Bail accordingly, lately adopted by the Court of *King's Bench*.

This Writ has issued under these Circumstances; a Demand arising several Years ago; the Account settled by a common Agent: that Settlement leaving a Balance of £301 to be paid by the Defendant, known to be the Captain of an *India* Ship, and the Time of her sailing known; and no Reason appears, why this Writ should not have issued, so that the Answer might have been put in, and the Thing settled, long ago In such a Case it is extremely reasonable, that the Defendant should be discharged, paying into Court the Balance of £301, deducting the Costs he has been put to. Let him pay in that Sum, with Liberty to apply for the Costs, when taxed (*a*).

(*a*) See the brief View of the Writ of *Ne exeat Regno* by Mr. *Beames*.

1818.
April 23.
Ante, p. 202

An Issue directed. Liberty for each Party to examine the other refused without Consent.

HOWARD *v.* BRAITHWAITE.

IN this Cause (*a*) the *Lord Chancellor* again went through the Circumstances; and, repeating the Opinion he had formerly expressed, declared, that the Court could not decree a specific Performance; but would direct an Issue, if the Plaintiffs chose to take it, whether the Defendant's Solicitor was lawfully authorized to sign the Agreement; though, the Plaintiff's Solicitor being dead, and *Ashton*, it was said, not to be found, the Plaintiffs would try it with great Disadvantage; that, if the Plaintiffs would not try it, the Bill must be dismissed: but the Court would never give Costs in such a Case.

Mr. *Leach*, for the Plaintiffs, accepted the Offer of an Issue; and proposed, that each Party should have Liberty to examine the other as a Witness.

The Lord CHANCELLOR said, that was a very important Consideration; and could not be without Consent.

The Decree was pronounced accordingly for an Issue without that Direction.

(*a*) Reported *ante*, p. 202.

WINCH

ROLLS. 1812. Dec. 18.

WINCH *v.* WINCHESTER.

Purchaser not entitled to an Abatement for a Deficiency in Quantity; the Particular describing the Estate, as containing by Estimation Forty-one Acres, be the same more or less. Parol Evidence of Declarations by the Auctioneer at the Sale, warranting the Quantity, received in Opposition to a specific Performance, on the Ground of Fraud; not to enforce Performance.

IN *December*, 1809, the Plaintiffs, as Trustees under a Deed executed by *Edward Jewhurst*, put up to Sale by Auction an Estate described by the Particular as "containing by Estimation Forty-one Acres, be the "same more or less," and as being in the Occupation of *Edward Jewhurst*. At the Sale *John Ayerst*, as the Agent of the Defendant, became the Purchaser; and signed an Agreement for that Purpose; and shortly after the Sale entered into Possession. The Bill prayed a specific Performance.

The Defendant by his Answer stated, that he was induced to purchase under the Impression, that the Farm contained the particular Quantity of Land alleged; that his Agent previously to the Sale had been informed by *Jewhurst*, in answer to an Inquiry, that the Estate consisted of Forty-one Acres; and had at the Sale and previously to its commencing publicly asked the Auctioneer, what Quantity he sold the Farm for; who replied, " Forty-one Acres;" adding " if the Purchaser does not like to take it so, it " shall be measured: and if it proves more, the Excess must be paid for; if less, an Abatement shall be made." The Answer farther stated that the Land had been since measured, and amounted only to between Thirty-five and Thirty-six Acres; but the Defendant submitted to perform the Agreement, having an Abatement for the Quantity of Land deficient.

Sir *Samuel Romilly*, and Mr. *Newland*, for the Plaintiffs, insisted, that a specific Performance must under the Circumstances be decreed: and mentioned *Higginson* v.

1812.
Winch
v.
Winchester.

Clowes (a), as an Authority, that parol Evidence of Declarations by the Auctioneer cannot be read to explain the Particular of Sale.

Mr. *Hart*, and Mr. *Grimwood*, for the Defendant.

The Master *of the* Rolls.

This Bill seeks to compel the Defendant specifically to perform an Agreement, into which he entered for the Purchase of an Estate, which had belonged to *Jewhurst*, who conveyed to the Plaintiffs, on Trust to sell for the Payment of his Debts. The Plaintiffs, as Trustees, put the Estate up to Sale by Auction in 1809. The Defendant through his Father-in-law *Ayerst* was the Purchaser, who signed the Agreement on the Particular. The Description of the Estate in the Particular represents it as containing by Estimation Forty-one Acres, be the same more or less. The only Objection made is, that the Estate does not contain Forty-one Acres; but upon measurement appears to be less than that Quantity by Five Acres and a Fraction: the Defendant insisting upon an Abatement out of the Purchase-money for this Difference; first, upon the Specification of Quantity in the Particular; next upon the Ground of a Representation, or Warranty, verbally given by the Auctioneer at the Time of the Sale.

As to the Effect of the Words "be the "same more "or less" in a Particular of Sale, *Quære*.

First, the Effect of the Words "more or less," added to the Statement of Quantity, has never been yet absolutely fixed by Decision (b); being considered, sometimes as extending only to cover a small Difference, the one Way, or the other; sometimes, as leaving the Quantity altogether uncertain, and throwing upon the Purchaser the

(a) 15 *Ves.* 516; and see *Clowes* v. *Higginson*, *Post.* 394.

(b) *Hill* v. *Buckley*, 17 *Ves.*

Necessity

Necessity of satisfying himself with regard to it. In this Instance the Description is rendered still more loose by the Addition of the Words "by Estimation." The estimated Extent of Ground frequently proves quite different from its Contents by actual Measurement. It cannot be contended, that the Terms "estimated" and "measured" have the same Meaning. If a Man were told, that a Piece of Land was never measured, but is estimated to contain Forty-one Acres, would that Representation be falsified by shewing, that, when measured, it did not contain the specified Number of Acres? The only Contradiction to that Proposition would be, that it had not been estimated to contain so much.

Supposing, that the Vendors knew the true Quantity, it would be a different Question, whether by the Use of such Phrases they could be protected from the Obligation to make it good. Some Attempt was made to affect them with such Knowledge through the Medium of *Jewhurst*, who, according to the Testimony of one *Noakes*, when a Valuation of the Lands in the Parish was making by Direction of the Parishioners, stated to the Valuers the Contents of his Farm, as amounting only to Twenty-nine Acres, exclusive of Hedges, Roads, and Waste, and said, the Map Account was Thirty-six Acres; and then one *Springet* deposes, that Two or Three Days before the Sale *Jewhurst* walked over the Farm with him, and specified the Contents of the different Fields; which, being added together, amounted to Forty-one Acres.

What *Jewhurst's* own Knowledge, or Belief, was upon this Subject is not ascertained. He may as well be supposed to have purposely under-stated the Quantity on the one Occasion as to have over-stated it on the other; but, be that as it may, it is not shewn, that the Plaintiffs knew any Thing of either Statement. It does not appear, that *Jewhurst*

1812.
WINCH
v.
WINCHESTER.

Jewhurst was employed by them to show, or describe, the Lands; or was in any way their Agent. They are therefore not bound by any Representation of his; and, putting Fraud, as it must be put, out of the Question, I do not conceive, that the Defendant is entitled to an Abatement out of the Purchase-money for the Deficiency of Quantity.

The Question then is as to the Admissibility; and next as to the Sufficiency, of the Evidence of the Auctioneer's Declaration at the Sale. The Defendant says, *Ayerst*, his Agent, distinctly inquired of the Auctioneer, for what Quantity he sold the Farm; and the Auctioneer answered "we sell it for Forty-one Acres: but, if the "Purchaser does not like to take it so, it shall be "measured; and, if it proves more, the Excess must be "paid for: if less, an Abatement shall be made."

As to the Admissibility of the Evidence, it must depend upon the Purpose, for which it is produced. If the Defendant insists, that, the Evidence being received, he will be entitled to have the Contract performed with an Abatement of the Price, I think it not admissible for that Purpose; as the Court cannot execute in his Favor a written Agreement with a Variation introduced by parol Testimony: but, if he says, he was deceived by this Representation, and therefore was induced by Fraud to enter into the Contract, and offers the Evidence for the Purpose of getting rid of such Contract altogether, for that Purpose, I think, it may be received; as, if such a Declaration was made by the Auctioneer, it would undoubtedly be fraudulent and unfair in the Plaintiffs to insist upon the Execution of the Contract, not giving the Defendant the Benefit of that Declaration *(a)*.

(a) The Marquis of Townshend v. *Stangroom*, 6 *Ves.* 328. *Ramsbottom* v. *Gosden*, *Ante* 165; and the References. *Clowes* v. *Higginson*, *Post.*

With

1812.
WINCH
v.
WINCHESTER.

With regard to the Evidence itself, Three Witnesses depose positivly to the Declaration, as made by the Auctioneer in the Terms I have mentioned: Two, of the Name of *Springet*, do not recollect, that it was preceded by an Inquiry from any Person: but *Ayerst* says, it was an Answer, made to an Inquiry by him in the Hearing of all the Persons present; and Two of the Plaintiffs he says, were present, and did not contradict the Auctioneer. On the other Hand, the Auctioneer, being examined, does not in plain and explicit Terms deny such Declaration; but says he did not make any Declaration contradictory to the Representation by the Particular; and that he was not authorized to make the Declaration, specified by *Ayerst*, and stated in the Answer; not, that he did not make a Declaration in those Words. That Declaration is therefore made out sufficiently by the Evidence.

It is said for the Plaintiffs, that, at most, this gives an Option to the Defendant either to take the Land as Forty-one Acres, or to have it measured; and that by taking possession, and begining to cultivate the Land, he waived that Option, and consented to take it as Forty-one Acres: but, if the parol Evidence is to be taken as the Rule, the Defendant was to have the Land, be the Quantity what it might: the Measurement was material only to ascertain the Price; and therefore was in Time, if before the Payment. Several Observations were made upon the Inconsistency of the Defendant's Conduct on the Supposition, that the Payment was to be by Measurement: if so, the Measuring was as much of course as the valuing of the Timber, or the Stock; and yet no Proposition came from the Defendant for Measurement; and it was by mere Accident, that, the Persons, who were to value the Timber, not being able to agree upon the Value of a Copse-wood in one Field, and having that measured,

1812. Winch v. Winchester.

measured, *Ayerst* said, as they were measuring Part, they might as well measure the whole. The Defendant thought so little of measuring the Land, that he appointed a Day for finally settling the Business, not knowing that any Measurement had taken place; and at that Meeting he was informed by *Ayerst* of the Measurement and the Result. Upon that a long Negociation and Correspondence took place, and several Meetings; and at none of them did the Defendant insist upon this parol Declaration, supposed to have been made at the Auction, whereas the Objection was plain. no Matter, what the Conditions of Sale import. the Auctioneer did say distinctly, that the Land was to be measured, and to be paid for accordingly.

These Circumstances throw a Degree of Doubt upon the Evidence; but are not sufficient to impeach its Veracity, particularly in the Absence of a plain Denial by the Auctioneer himself; and with this Circumstance, that a Witness represents the Auctioneer to have said, at a subsequent Period, that he did sell at Forty-one Acres; and if it turned out less, there should be an Abatement. The Answer therefore asserting, that such Declaration was made at the Sale, is sufficiently made out; and consequently the Defendant cannot be compelled to take the Land without an Abatement. If he will not take it, the Bill must be dismissed; but without Costs; as the Defence is one, to which he did not resort until after the Institution of the Suit.

1813.
LINCOLN'S INN HALL.
March 31.
April 2.

Suggestion, that the Defendant is doubly vexed by Suits in Equity and at Law for the same Matter, ascertained by Reference to the Master.

BOYD *v.* HEINZELMAN.

ON the 28th of *January* the Defendants, having put in their Answer, obtained an Order, that the Plaintiffs should elect, whether they would proceed at Law or in this Court; on the Allegation, that the Plaintiffs prosecuted the Defendants at Law, and in this Court for one and the same Matter, whereby they were doubly vexed *(a)*.

A Motion was made by the Plaintiffs to discharge that Order with Costs for Irregularity; as obtained on a false Allegation *(b)*.

Mr *Leach*, and Mr. *Shadwell*, in support of the Motion, contended, that this Order was obtained upon a false Allegation; and the Plaintiffs, being, as in the Case of a Mortgage (c), entitled to proceed both at Law and in Equity, could not be put to Election; that, having Bills of Exchange, they were at Liberty to proceed on those Bills at Law, and to come into this Court to establish their Lien on the Goods, consigned to the Defendants to answer the Debt: a collateral Security not having the Effect of releasing the personal Remedy.

Sir *Samuel Romilly*, for the Defendants, insisted, that it was of course to put a Party to elect. and if he

(a) See *Jones* v. *Earl Stafford*. 3 *P. Wms.* 90, and Note (*b*) as to this Practice.

(b) *Buller* v. *Butcher*, 2 *Dick.* 558.

(c) See *Lyster* v. *Dolland*, 1 *Ves.* jun. 431, *Booth* v. *Booth*, 2 *Atk.* 342.

objects,

1815.
Boyd
v.
Heinzelman.

objects, the usual Practice is a Reference to the Master; that this bears no Resemblance to a Mortgage; being a personal Demand in Equity, and a personal Demand at Law: a Suit and an Action for one and the same Matter.

The Lord Chancellor.

The only Question is, whether the Court is in the Habit itself of looking into the Matter, to see, whether the Suggestion is false, or of sending it to the Master to ascertain the Fact. As far as my own Experience goes, when an Order, proceeding upon such a Suggestion, is questioned, the Court does not take upon itself to examine it, but sends it to the Master: and the Principle of that Proceeding is, that, though the Fact may be sometimes a very simple one, it is often very complicated; and, if the Court were to examine it in the one Case, it must in the other; and there would be no End to the Inconvenience.

Mr. *Leach*, mentioned the Case of *Mouseley* v. *Basnett*, from the *Register's* Book.

The Lord Chancellor, having read the Note, said, that was the Course; and the Order might be made conformably to it.

The Order was accordingly made in the Terms of *Mouseley* v. *Basnett* (a).

(a) *Mouseley* v. *Basnett*, 23d *Feb.* 1790.—Reg. Lib. B. 1789, Fo. 212.

By the Order, reciting, that by an Order made in this Cause the 10th Day of *Feb.* inst. suggesting, that the Plaintiff prosecuted the Defendant both at Law and in this Court for one and the same Matter, whereby the Defendant was doubly vexed, it

1813.

BOYD v. HEINZELMAN.

it is ordered that the Plaintiff, his Clerk in Court, and Attorney at Law, having Notice thereof, should within Eight Days after such Notice make his Election, in which Court he would proceed, and if the Plaintiff should elect to proceed in this Court, then the Plaintiff's Proceedings at Law were thereby stayed by Injunction, but if the Plaintiffs should elect to proceed at Law, or in Default of such Election by the Time aforesaid, then the Plaintiff's Bill was from thenceforth to stand dismissed out of this Court as against the Defendant with Costs to be taxed, &c. and stating, that it was alledged, that the said Order was obtained on a false Suggestion, for that the Matters, for which the Plaintiff is proceeding at Law and in this Court, are not the same, but distinct Matters, and therefore it was prayed, that this Order might be discharged, and that the Defendant might pay to the Plaintiff the Costs of this Application to be taxed, his Lordship doth order, that it be referred to the said Master to see, if the Plaintiff's Proceedings at Law and in this Court are for and touching the same Matters; and he is to state the same with his Opinion thereon to the Court. but the Plaintiff is to be at Liberty to proceed in the Action at Law in the mean Time.

The Master made his Report, bearing Date the 13th Day of *April*, 1790: and thereby certified, that he was of Opinion, that the Plaintiff's Proceedings at Law, and in this Court against the Defendant were not for and touching the same Matters, and on the 16th *April*, 1790, the Plaintiff applied to the Court to discharge the Order of the 10th of *Feb.* and that the Defendant might pay unto the Plaintiff the Costs of the said Reference, and also the Costs of this Application, to be taxed by the Master; which the Court ordered accordinly.—Reg. Lib. B. 1789. Fo. 137.

In

In the Vacation after *Hilary* Term, the following Appointments took place:

Sir *Thomas Plumer*, His Majesty's Attorney-General, was appointed *Vice Chancellor* of *England* under an Act of Parliament passed in this Session.

Sir *William Garrow*, His Majesty's Solicitor-General, was appointed Attorney-General.

Mr. *Dallas*, Cheif Justice of *Chester*, was appointed Solicitor-General.

In *Easter* Term Mr. *Richards* was appointed Chief Justice of *Chester*.

END OF THE SECOND PART.

Brooke, Printer, Paternoster Row, London.

CASES

IN

CHANCERY, &c.

1813, 52 *Geo.* 3.

Rolls.
1813,
Jan. 28.
Feb. 1.

HUMBERSTONE *v.* STANTON.

Bequest to a Son of the Testator on his accomplishing his Apprenticeship, with the Dividends in the mean Time for Maintenance; and in case he shall die, before he accomplishes his Apprenticeship, then and in such Case to the other Children.

The Legacy lapsed by the Death of the Legatee, having accomplished his Apprenticeship, in the Testator's Life.

JOSEPH Judge by his Will, dated the 4th of *May*, 1781, giving £750 3 *per Cent. Bank Annuities* to Trustees for his Wife for Life, and directing them to sell out £50, Part of such *Bank Annuities*, for placing out his Son *Joseph* Apprentice, proceeds as follows: "And "from and after my dear Wife's Decease I give and be- "queath £450 of the said Stock, or in case the £50 "Stock shall be sold to put forth my said Son *Joseph* "an Apprentice, then and in such Case only £400 of "the said Stock to my said Son *Joseph* to be transferred "to him on his compleating and fully accomplishing his "Apprenticeship; and the Interest, Dividends, and Pro- "fits, thereof in the mean Time to be applied by my said "Trustees for his my said Son *Joseph*'s Clothing and Ne-

1813.

HUMBERSTONE v. STANTON.

"cessaries during and until he hath accomplished his "Apprenticeship; and in case my said Son *Joseph* should "die before he accomplishes his Apprenticeship, then "and in such Case I give the said £450 Stock, or £400 "Stock, as under the aforesaid Bequest it may happen to "be, to my aforesaid Son *Richard*, and my aforesaid "Three Daughters *Anne*, *Elizabeth*, and *Mary*, or to "such of them as may be living at the Time of this Con-"tingency happening, equally to be divided between "them Share and Share alike: but if any of them should "be dead at the Time of such Contingency" the Parents Share to devolve to the Issue.

The Testator bequeathed the Residue of his personal Estate to his Wife; appointing her and Three other Persons Executors. After the Execution of his Will he placed his Son *Joseph* out an Apprentice; who, having compleated his Apprenticeship, died in *September*, 1790, in his Father's Life-time; who died in *January*, 1792.

The Plaintiff, as the personal Representative of the Testator's Widow and residuary Legatee, filed the Bill; praying, that she may be declared entitled to the £450 Stock.

Mr. *Hart*, and Mr. *Bell*, for the Plaintiff.

The Persons, to whom this Legacy of Stock is given over upon the Death of the Testator's Son *Joseph* before his Apprenticeship accomplished, are not entitled in the Event, that has happened: but by the Death of the Legatee in the Testator's Life it falls into the Residue as a lapsed Legacy. The Bequest over, only upon an Event, which never happened, cannot take Effect, as if that Event had happened. The Cases, *Jones* v. *Westcomb* (a),

(a) *Pre. in Ch.* 316.

and

and *Statham* v. *Bell (a)*, where the Limitation upon the supposed Pregnancy of the Testator's Wife was established, though she proved not to have been pregnant, and therefore the Event contemplated never happened, are distinguished in this Respect; that the Legatee under this Will lived to attain the Period, at which his Legacy was to vest: an Event, the Completion of which within the Terms of this Will destroys the Limitation over: the Legacy failing afterwards, by the Death of the Legatee, not before the Period, at which he would have taken a vested Interest, but during the Testator's Life; the common Case of Lapse. The Case of *Northey* v. *Strange (b)* also was upon the Ground, that the Legatee died before the Testator, and under Twenty-one: but there is no Instance, that, the Legatee dying after having attained the Age of vesting, the Limitation over was allowed to take Effect on the Ground, that the Legatee, not having survived the Testator, never actually received the Legacy. In the one Case the Testator contemplates a particular Event, as preceding the Limitation over; and, if that Event never happens, the preceding Estate being removed out of the Way, whether by the Person to take never coming into Existence, or the Life not enduring to a particular Age is immaterial, the Limitation over is brought forward; and takes Effect: in the other Case the Event has happened, upon which the Will declares, that the Limitation over cannot take place; and the general Law determines the Legacy lapsed, as if there was no Disposition.

Sir *Samuel Romilly*, and Mr. *Grimwood*, for the Defendants, claiming under the Limitation over, contended, that this fell within the Case of *Jones* v. *Westcomb*: a mere Question of Intention, whether, if this Son could

(a) *Cowp.* 40. (b) 1 *P. W.* 340.

1813.

HUMBERSTONE v. STANTON.

Feb. 1.

not take, the Legacy should not go over to the other Children.

The MASTER *of the* ROLLS.

It being sufficiently proved, that the Son compleated the Term of his Apprenticeship before the Testator's Death, the Question is, whether by his Death afterwards in the Testator's Life-time the Bequest over takes Effect. It seems formerly to have been a Question, whether a Bequest over in case of the Death of the Legatee before a certain Period could take Effect, when he died during the Testator's Life, though before the Period specified. In the Case of *Willing* v. *Baine (a)* Legacies were given to Children, payable at their respective Ages of Twenty-one; and if any of them died before that Age, the Legacy, given to the Person so dying, to go to the Survivors: one having died under Twenty-one in the Life of the Testator, it was contended, that his Legacy lapsed; and did not go over to the Survivors. The Argument was, that the Bequest over could not take place; as "there "can be no Legacy, unless the Legatee survives the Tes-"tator: the Will not speaking till then: wherefore this "must only be intended, where the Legatee survives the "Testator; so that the Legacy vests in him, and then he "dies before his Age of Twenty-one."

Bequest over in case of the Death of a Legatee before a certain Period takes Effect on his Death within that Period during the Testator's Life.

It was however held, and is now settled, that in such a Case the Bequest over takes place. Here however it is contended, that though the Legatee has survived the specified Period, or Event, and though the Contingency, upon which alone the Legacy is given over, has not happened, still the Bequest over is to take Effect. If *Joseph*, having compleated his Apprenticeship, had survived the

(a) 3 P. Will. 113.

Testator,

1813.
HUMBERSTONE
v.
STANTON.

Testator, it is clear, that the Legacy would have vested in him absolutely: for its being given from and immediately after the Death of the Person, entitled for Life, would not have suspended the vesting. The Event, which was to bar the Claim of the Brothers and Sisters, has happened; as he compleated his Apprenticeship before his Death. His Death in the Testator's Life produces Lapse; and lets in the residuary Legatees.

Lapse by Death of the Legatee in the Life of the Testator, though having survived the Period, at which the Legacy was to vest: that Event not being provided for.

There are Two Cases decisive upon this, *Calthorpe* v. *Gough* (a) and *Doo* v. *Brabant* (b). In the former £10,000 was bequeathed in Trust for the separate Use of Lady *Gough*, and, in case she should die in the Life of her Husband, according to her Appointment; and for want of Appointment, among the Children: but, if she should survive her Husband, then the whole to her. The Event, in which the Children were to take, did not happen: that, in which she was to take absolutely, did: but she died in the Testator's Life; and it was determined to be a Case of Lapse. In *Doo* v. *Brabant* a Legacy was bequeathed in Trust for *Sarah Counsell*, until she should attain Twenty-one; and then to transfer to her: in case she should die under Twenty-one leaving Children, in Trust for her Children; and if she should die under Twenty-one without leaving a Child, or Children, or being such they should all die under Twenty-one, over. She attained Twenty-one; married; and had Children; but died before the Testatrix; leaving Two infant Children surviving her. Lord *Thurlow* according to *Brown* seems to disapprove of *Calthorpe* v. *Gough*; and to incline to the Opinion, that upon *Jones* v. *Westcomb* and other Cases of that Class the Children should be let in to take; but sent a Case to the Court of *King's Bench*;

(a) 3 *Bro. C. C.* 395, n. (b) 3 *Bro. C. C.* 393. 4 Term Rep. 706.

1813. HUMBERSTONE v. STANTON.

who held with great clearness, that the Children could take nothing. Lord *Kenyon* says, "if this Event had "occurred to the Testatrix, most probably she would have "provided for it, and given the Money to the Grand-"children: but, as she has not done so, we cannot make "a Will for her."

Lord *Alvanley* had made a similar Observation in *Calthorpe* v. *Gough*.

Here the Testator has left his actual Intention, at least as much unexplained as in those Cases. Therefore I must abide by the Words; and according to them there is no Foundation for the Claim, set up by the Defendants. The Plaintiff consequently must have a Decree. The Costs of all Parties should come out of the Estate; being occasioned by the Ambiguity of the Will.

ROLLS. 1813, *Feb.* 4.

SHEATH *v.* YORK.

Testator, a Widower, having a Son and two Daughters, by Will gave all his real and personal Estates in Trust, subject to Debts, for those Children, and in case of their Deaths over. Marriage and the Birth of a Daughter, held a Revocation of the Will in the Ecclesiastical Court, (against a former Decision) not a Revocation of the Devise of the real Estate.

HENRY Clarke by his Will gave to Trustees all his real and personal Estate upon Trust to sell; and after Payment of all his Debts, &c. to place out the Residue of the Monies, arising from such Sale on Government or other Security, and pay the Interest, &c. towards the Maintenance and Education of his Son *John* and Daughters *Mary* and *Elizabeth*, until they should attain

1813.

SHEATH v. YORK.

attain Twenty-one, and then to pay the Principal equally unto and amongst his said Children: but in case all his said Children should die under Age and without leaving Issue, then upon Trust to pay the Residue unto his Cousins *Peregrine Clarke, Henry Clarke,* and *Mary,* the Wife of *Joseph Fowdrell:* and he appointed his Trustees Executors and Guardians of his Children.

At the Time of making his Will the Testator was a Widower having the Three Children only named in his Will. He afterwards married a second Wife by whom he had Issue one Daughter. He died in *November,* 1810; and his Son *John Clarke* died an Infant in *September,* 1811.

A Suit having been instituted in the Prerogative Court of *Canterbury,* that Court decreed, that the Will was revoked by the subsequent Marriage and Birth of the Child. A Bill was then filed by some of the simple Contract Creditors of the Testator against the Executors and Trustees of the Testator, his Two Daughters by the first Marriage, and those in Remainder, &c. praying an Account, Payment, and Sale.

Sir *Samuel Romilly,* and Mr. *Heald,* for the Plaintiffs: Mr. *Agar,* for the Defendant *York,* and Mr. *Winthrop,* for those in Remainder, claiming under the Will.

With respect to the Proposition, that a Will is revoked by a subsequent Marriage and Birth of a Child, the Testator having Children at the Time of making the Will, there is probably no Authority to be found except *Thompson* v. *Sheppard,* briefly mentioned in the Margin of *Ambler (a);* according to which there is a Revocation

(a) *Jackson* v. *Hurlock,* *Ambl.* 490, and *Parsons* v. *Lanoe, Ambl.* 561.

 under

1813.
SHEATH
v.
YORK.

under those Circumstances. It is not however necessary to determine that general Proposition: the Question here being simply, whether a subsequent Marriage and Birth of Children are a Revocation; the Testator having at the Time of making his Will a Son by a former Marriage.

It is not easy to discover the Principle, upon which these Cases of implied Revocation have gone *(a)*. The first Case, in which real Estate was involved, is *Christopher* v. *Christopher (b)*: but in *Doe* on the Demise of *Lancashire* v. *Lancashire (c)* Lord *Kenyon* puts it on a very different Ground, an implied Condition, annexed to the Will itself at the Time of making it, that the Testator does not then intend it to have Effect, if there should be a total Change in the Situation of his Family. In this Case, taking the Marriage and Birth of a Child to be a Revocation, no Benefit, would, as far as the real Estate is concerned, result to Children of the second Marriage; the whole of the real Estate devolving upon the Son by the first Marriage; and that Effect of the Law cannot be controuled by any presumed Intention in Favor of Children by the second Marriage. What Inference does the Marriage afford, that the Testator meant to deprive his Two Daughters by the first Marriage of their Provision? Suppose a Testator died seised of Gavelkind Land, and other Property: how could the Court interfere without an Inquiry, not merely as to the State of the Property but of the Family; and where would the Inconvenience stop? Suppose a Daughter by the first Marriage, and a Son by the second: what would be the Effect of holding the second Marriage and Birth of the Son a

(a) See 2 *Fonbl.* Treat. Eq. p. 350, Note *(b)*.

(b) 2 *Dick.* 445. In the Court of *Exchequer*, *July* 6th, 1771. See 4 *Burr.* 2171, 2182. *Doug.* 35.

(c) 5 Term Rep. 49.

Revocation

1813.
SHEATH
v.
YORK.

Revocation but to give the Estate to the Son? These Cases may serve to shew the Difficulty of applying this as a general Rule, with reference to the Interest and Convenience of Families. In the Case *Ex parte the Earl of Ilchester (a)*, Marriage and the Birth of Children were held not to be a Revocation; the Wife and Children being provided for by Settlement. In *Brady* v. *Cubitt.(b)*, Mr. Justice *Buller* lays it down, that "implied Revocations must depend on the Circumstances at the Time "of the Testator's Death" All the Cases have proceeded on the compleat Alteration of the Circumstances of the Testator's Family; to which his Intention could not be presumed to apply; as by the Marriage of a Bachelor with the Birth of a Child: but Marriage alone is not such a Change; and, therefore, has not been held a Revocation: nor the Birth of Children by a Marriage subsisting at the Date of the Will. The Result of all the Authorities is, that, where a Testator has made an express Provision for his Children, no Circumstances shall by Implication revoke that Act, which he was bound in Duty to perform; on the contrary the Provision shall rebut the Presumption of an Intention to revoke: *Gray* v. *Altham (c)*. In the Case of *Kenebel* v *Scrafton (d)*, Marriage and the Birth of Children did not revoke a Will, contemplating and expressly providing for future Children.

(a) 7 *Ves.* 348.

(b) *Doug.* 31.

(c) Cited in *Jackson* v. *Hurlock*, *Amb.* 490.

(d) 5 *Ves.* 663. 2 *East.* 530. See Lord C. *Eldon*'s Observations on this Case in his Judgment in *Wilkinson* v. *Adam*, *post*. It is a remarkable Instance of the Inconsistency, to which these Presumptions lead. The Children of *M. A. Simpson* by the Testator could not take under that Description in his Will, except by the Effect of the very Circumstances, (their Birth in Marriage) from which the Revocation of that Will was to be presumed.

The

1813.

SHEATH
v.
YORK.

The Case of *Thompson* v. *Sheppard* was no Decision on real Estate. By the *Register's* Book (*a*) it appears, that,

(*a*) *Thompson* v. *Sheppard*, 5th *December*, 1779. (Reg. Lib. 1779. B. Folio 125.)

William Myall, in the Year 1760 married his first Wife in *England*: she died in 1769, leaving by him several Children, the Defendants. After her Death he made his Will, dated 15th *December*, 1771, having Freehold and personal Estates; and gave the Residue of his Estate and Effects to the Defendants, *Sheppard* and *Duffield*, in Trust to sell and divide among his Children by his first Wife; and made them Executors. Afterwards at *Jamaica* in *May*, 1772, *Myall* married the Plaintiff *Martha*, (afterwards Wife of Plaintiff *Thompson*) by whom he had Two Children, one of whom died in his *Myall's* Life-time, and the other was born after his Death. He died 20th *March*, 1774, at *Jamaica*. Suits in the Ecclesiastical Court had been commenced by *Sheppard* and *Duffield* to obtain Probate, and by the Plaintiff *Martha* for Administration as on an Intestacy. The Bill prayed a Declaration, that *Myall* might be declared to have died intestate; and to set aside a Deed of *February*, 1775, which the Bill alledged, the Plaintiff *Martha* had been fraudulently induced by *Sheppard* and *Duffield* to execute; whereby she gave up the Right to Administration; and for the consequent Accounts of his Estate.

The Court decreed, that *Sheppard* and *Duffield* proceed in the Suit, instituted by them in the Spiritual Court to obtain Probate; and that the Plaintiff also proceed in the Suit commenced there by her, in order to determine the Question as to his Will, independant of the Deed of *February*, 1775, which was not to be produced or made Use of in the said Suits in the Determination of the Question; and referred to the Master to take the Account of the personal Estate.

Nothing material appears farther in the *Register's* Book till the 5th *May*, 1788. (Reg. Lib. 1788. B. 458.) From the Master's Report, there stated, it appears, that the

1813.

SHEATH v. YORK.

that, though the Testator had real Estate, it could not possibly have passed under his Will; which was not executed so as to pass real Estates. The real Estate therefore is not once mentioned in all the subsequent Proceedings; and, attending to that Circumstance, the Case is no Authority. Here, there being Children of the former Marriage, that total Alteration in the Family is wanting, on which all the Cases turn; and which is so much relied on by Lord *Ellenborough* in *Kenebel* v. *Scrafton*.

Mr. *Wingfield*, for the Two Daughters by the first Marriage.

the Defendants *Sheppard* and *Duffield* proceeded in the Ecclesiastical Court to obtain Probate of the Will; and that on 3d *December*, 1779, a Decree was there made for the Validity of the Will; and Probate was decreed. The Plaintiffs appealed to the Delegates; which Appeal they afterwards withdrew, and, to prevent all farther Litigation, an Agreement was executed by the Parties, dated 14th *August*, 1780, whereby they agreed to terminate their Differences upon the Terms therein mentioned, and the Plaintiff agreed to give no farther Opposition to the Probate and all Matters were settled, except as to the Costs in this Court, which the Defendants would not allow to her. By an Order, 24th *February*, 1782. (Reg. Lib. 1782. B. Folio 205.) it was referred to the Master to inquire, whether that Agreement was for the Benefit of the Infants, and the Persons claiming under the Will of the Testator. The Master made his separate Report 20th *December*, 1782; and certified, that the Agreement was for the Benefit of the Infants; and that it had been carried into Execution; and now on the coming on of the Cause on that Report it was referred to the Master to tax all Parties their Costs, and Directions were given for the Purpose of winding up the Cause.

This

1813. Skeath v. York.

This Case, though new in its Circumstances, all former Cases applying to Widowers or Bachelors without Children at the Time of making their Wills, fall within the general Rule, holding the Marriage and Birth of a Child a Revocation, upon the Presumption, that the Will was not intended to apply to such an Alteration of Circumstances. In *Brady* v. *Cubitt* Lord *Mansfield* takes the Distinction between a total and a partial Disposition: and in *Doe* on the Demise of *Lancashire* v. *Lancashire* Lord *Kenyon* puts it, not upon an Alteration of Intention, as the Testator may be ignorant of the Effect at Law of subsequent Events upon his Will, but upon a tacit Condition, annexed to the Will, that under such a total Change of Circumstances it should not stand. The Decision of the Ecclesiastical Court on this Case may be placed against the Authority of *Thompson* v. *Sheppard*. If there is any Hardship in establishing the Revocation under these Circumstances, it is the Effect of a settled Rule of Law: this Case having none of the Circumstances, which have been considered as Exceptions.

Sir *Samuel Romilly*, in Reply.

The Argument on this Case shews the extreme Danger of Courts assuming the Power of legislating. The Effect is great Difficulty in ascertaining the Rule, always fluctuating; and there are no Means of distinctly tracing the Principle, upon which the different Decisions have proceeded. The Case of *Kenebel* v. *Scrafton* proceeded on its own peculiar Circumstances: but few Decisions could have been more opposite to the actual Intention of the Testator in the possible Event, that there had been many Children born before the Marriage, and only one born after; the latter monopolizing the whole Property. In holding a Marriage when coupled with the Birth of a Child, a Revocation, the Courts seem to have proceeded

on

1813. SHEATH v. YORK.

on the Effect, that the Children would otherwise be unprovided for: Marriage, therefore, as standing by itself, has not been held a Revocation, but the Moment a Child comes into Existence the Will has been considered as revoked, as the only Means of obviating the Injustice the Courts would guard against.

The MASTER *of the* ROLLS.

Marriage and Birth of a Child an implied Revocation of a Will of personal Property.

Even a Devise of Land may be revoked by Implication from a total Change in the Situation of the Family, as, the Devisor having no Children at the Date of the Will, by his Marriage and the Birth of an Heir; upon an implied Condition, that the Will should not operate in that Event.

Long after it had been settled by Decisions of the Ecclesiastical Court, with the Concurrence of Common Law Judges, sitting in the Court of Delegates, that Marriage and the Birth of a Child would amount to a Revocation of a Will of personal Property, it remained a Doubt, whether such an Alteration of Circumstances would have the same Effect with regard to a Will of real Estate: but it is now settled, that even a Devise of Land may be revoked by what Lord *Kenyon* in the Case of *Doe* on the Demise of *Lancashire* v. *Lancashire* (a) calls " a total Change in the Situation of the Testator's " Family." What shall be deemed such a total Change may be Matter of Controversy in each new Case: but all the Cases, in which hitherto Wills of Land have been set aside upon this Doctrine, have been very simple in their Circumstances; and such as, when the Doctrine was once received, could admit of no Doubt with respect to its Application. In all of them the Will has been that of a Person, who, having no Children at the Time of making it, has afterwards married, and had an Heir born to him. The Effect has been to let in such after-born Heir, to take an Estate, disposed of by a Will, made before his Birth. The Condition, implied in those Cases, was, that the Testator, when he made his Will in Favor of a

(a) 5 Term Rep. 58.

Stranger

1813. SHEATH v. YORK.

Stranger or more remote Relation, intended, that it should not operate, if he should have an Heir of his own Body.

In this Case there is no Room for the Operation of such a Condition; as this Testator had Children at the Date of the Will; of whom one was his Heir apparent; who was alive at the Time of the second Marriage, of the Birth of the Children by that Marriage, and of the Testator's Death. Upon no rational Principle therefore can this Testator be supposed to have intended to revoke his Will on account of the Birth of other Children; those Children not deriving any Benefit whatsoever from the Revocation; which would have operated only to let in the eldest Son to the whole of that Estate, which he had by the Will divided between that eldest Son and the other Children of the first Marriage.

It is true, the Ecclesiastical Court has decided, that the Will was revoked as to the personal Estate: that is in Opposition to their Decision in *Thompson* v. *Sheppard*, in 1779; where under Circumstances precisely the same the Will was held not revoked even as to the personal Estate. There was in that Case an Appeal to the Delegates, but it was not prosecuted. The Revocation however as to the personal Estate had an Effect, which might perhaps have been intended by the Testator: that of letting in the after-born Children with those of the first Marriage: but the Principle of the Decision has no Bearing whatsoever upon the Devise of the real Estate; which according to my Opinion stands unrevoked.

Rolls.
1813,
Feb. 9. 13. 15.

WHITE *v.* ST. BARBE.

Under a Power to appoint among Children Interests may be given to Grandchildren by way of Settlement with the Concurrence of their Mother, an Object of the Power, and her Husband.

ALEXANDER St. Barbe by his Will, dated the 2d of *July*, 1797, disposed of his Property in the following Manner:

"All Monies and Property belonging to me I give to "my Wife Mrs. *Christian St. Barbe*, in Trust for her "to dispose of to our Children, and whenever she may "judge most proper for their Interest: she may, if she "thinks proper, keep the Whole for her Life, and then "leave it to our Children; and she may make Distinc- "tions in leaving more to one than the other, if she "pleases, in order to make them behave well: but the "Whole of the Property must be given into the Family; "except I give all the Household Goods, Plate, Linen, "and China to Mrs. *St. Barbe* for her to do with as "she pleases, and as her sole Property."

The Testator died in 1799, leaving Three Daughters: *Elizabeth Fielder*, *Catharine Randolph*, and *Christian White*. Mrs. *St. Barbe* having advanced Portions to each of her Daughters out of the Testator's residuary Estate, there remained, after those Advances, £4875, 3 *per Cent. Bank Annuities*, and £1561 : 3*s* : 7*d*. 5 *per Cent Navy Annuities*.

By a Deed of Appointment, dated the 28th of *June*, 1806, reciting, that *Christian St. Barbe* was desirous, and had agreed, in exercise of her Power under the Will of her Husband to appoint the £4875 3 *per Cents*. and £1000 (Part of £1561 : 5*s* : 7*d*.) *Navy Annuities*, ex-

pectant

1813.
White
v.
St. Barbe.

pectant on her own Decease, in Favor, and for the Benefit, of *Christian White*: and that it had been agreed, and especially by *Charles Henry White* and *Christian*, his Wife, that the Funds so to be appointed should be settled upon the Trusts therein mentioned for the several Benefits of *Christian White*, and her Children; and that, in order to declare and secure the respective Interests of *Christian White* and her Children, in such Funds, *Christian St. Barbe* should forthwith transfer them into the Names of the Trustees, in pursuance of that Agreement *Christian St. Barbe* covenanted with the Trustees at the Request and by the Direction of *White* and his Wife, that she would transfer the £4875 and £1000 Stock into the Names of the Trustees: and it was declared, and *Christian St. Barbe* did by such Direction as aforesaid in exercise of her Power under the Will and all other Powers enabling her thereto appoint, that they should settle the said Stock, when transferred to them, upon the following Trusts: in Trust, as to the Dividends and annual Produce, for *Christian St. Barbe* for Life; and after her Decease, as to the same Dividends and Produce, unto *Christian White* for Life, and after the Decease of the Survivor, in Trust as to the principal Sums of £4875 and £1000 Stock for all and every the Children of *Charles Henry White*, and *Christian* his Wife, then born and thereafter to be born equally; and to an only Child, if but one.

Shortly after Execution of this Appointment *Christian St. Barbe* transferred the Stock according to her Covenant. Soon afterwards in the same Year *Christian White* died; leaving Two Daughters, the Plaintiffs, her only Children. Her Husband took out Administration to her.

By another Indenture, dated the 22d of *October*, 1806, reciting the Appointment of the 28th of *June*, it is witnessed,

1813.

WHITE
v.
ST. BARBE.

witnessed, that for declaring and giving Effect to such of the Trusts and Purposes of the Deed of Appointment as were still subsisting or capable of taking Effect, and for providing for the Event of the Failure of all such Trusts and Purposes, the Trustees should stand possessed of the £4875, and £1000 Stock, upon Trust, as to the Interest, for *Christian St. Barbe* for Life, and, after her Death, to pay the Principal between the Plaintiffs *Eleanor St. Barbe White*, and *Christiana St. Barbe White*, the only Children of *Charles Henry White* by *Christian* his Wife, in equal Shares and Proportions, to vest at Twenty-one or Marriage with Benefit of Survivorship, and in case neither of them should attain Twenty-one, or be married, then to re-transfer all such Stock to *Christian St. Barbe*, her Executors, Administrators, or Assigns.

Elizabeth Fielder died in 1808; and *Catherine* in 1809. The Bill prayed, that the £4875 and £1000 Stock might be transferred into the Name of the *Accountant-General*, upon the Trusts of the Appointment, and properly secured for the Benefit of the Plaintiffs, subject to *Christian St. Barbe's* Life Interest; and that the Trustees might be restrained from transferring the Stock without the Direction of the Court.

The Answers insisted, that the Power, given by the Testator's Will, was confined in its Objects to his Children: that under the Will his three Daughters took vested Interests, subject to their Mother's Power to vary the Amount of their Shares; but, as the Mother made no Appointment to them in their Life-time, she had no Power to make any Appointment after their Deaths: that the Power did not extend to Grand-children; and the Stock was unappointed: the Defendant *Randolph* insisting, that it was a Joint-tenancy in the three Daughters: and, as his Wife had survived her two Sisters, the whole

1813. WHITE v. ST. BARBE.

became vested in her; and he, as her Administrator, was entitled to it.

Sir *Samuel Romilly*, and Mr. *Roupell*, for the Plaintiffs.

If the Power is not well executed, there is clearly a Tenancy in Common among the Daughters. This will be compared to the Case of Appointments by Will; which are certainly void for the Excess beyond the Power; for Instance as to Interests given to Grand-children under a Power to appoint to Children: Grand-children not being Objects of the Power: *Alexander* v. *Alexander (a)*: but this Question has been decided in *Langston* v. *Blackmore (b)*; and in *Alexander* v. *Alexander* the *Master of the Rolls* speaks to the same Effect *(c)*: "the Mother had a Power "to do something similar to this, but in another Way; for "though that Power would have enabled her for better "Advancement in Marriage to make a strict Settlement, "that is implicitly contained in that Power to limit any "Share she thought fit to give for Advancement of Mar-"riage in that Way: but she has not taken that Method; "for she has made a Disposition of it by her Will; and "therefore it must correspond with every Circumstance in "that Will."

This Question was also clearly decided in *Routledge* v. *Dorril (d)*; where Lord *Alvanley* states as to the Appointment, made on the Marriage of *Elizabeth Dorril*, that, where there is a Power to appoint among Persons, capable of such Appointment, and they come *in esse* at the particular Times to make the Appointment good, a Sum appointed, as in that Case to the Daughter, upon Marriage, though modified with respect to the Objects of

(a) 2 *Ves.* 640.
(b) *Amb.* 289.
(c) 2 *Ves.* 642.
(d) 2 *Ves.* jun. 357. See Page 362.

the

the Marriage, is a good Appointment, not to the Objects of the Marriage, but to the Daughter herself; and that Appointment was helda good Appointment to her; though, if it had been done by Will, and independent of any Modification, introduced by *Elizabeth*, the Daughter, it would not have been good; as the Husband, and the Children of the Marriage born after the Death of their Grandmother, were not immediate Objects of the Appointment. Therefore it was just as if it was appointed to her, and she had settled it so with the Husband.

That was precisely as Lord *Hardwicke* considered it in *Langston* v. *Blackmore*: but that was not, as *Routledge* v. *Dorril*, the Case of a Marriage then in Contemplation, but a Provision for any Wife the Son might afterwards marry, and Children by a subsequent Marriage. This therefore will be supported as an Appointment, not to the Grand-children, but to Mrs. *White* herself: the Intention in her Favor appearing upon the Deed; and her Children taking, not by direct Appointment, but under a Modification of the Property, letting them in, with the Consent of their Mother, an immediate Object of the Power. That certainly could not be done by Will; as is observed in *Alexander* v. *Alexander*; as that would be the sole Act of the Person having the Power; and the Interest would be taken directly under the Appointment by Persons, not Objects of it: but, where it is done by Deed, the immediate Object joining in the Act, and directing the Uses, all Objection is removed. From the Cases, that have been cited, Mr. *Sugden* (a) draws the same Conclusion, that in Equity a valid Appointment may be made to Persons, not Objects of the Power, with the Approbation of the real Object; and, though the Instance he puts, of such a Settlement upon the Marriage of a Child, is not applicable to this Case,

(a) *Sugden*, on Powers, 420.

1813.
WHITE
v.
ST. BARBE.

Mrs. *White* having been married before this Appointment, the Case of *Langston* v. *Blackmore,* which was upon a Settlement not in Contemplation of Marriage, shews, there is no such Distinction. This will therefore be sustained as an Appointment substantially to the Daughter, a proper Object of the Power; who, if the Appointment had been made directly to her, might the next Day with her Husband have made this Settlement.

Upon the Construction of the Will however it is not to be conceded, that Children only are the Objects of this Power: the Word " Family" extending to all Issue.

Mr. *Richards,* for Defendant, the Father of the Plaintiffs, who, as Administrator of his deceased Wife, had an Interest against them, but who had joined in the Appointment, declined arguing the Case.

Mr. *Leach,* and Mr. *Horne,* for the Defendant *Randolph.*

This is clearly a Power to appoint among Children. The Conclusion, attempted to be drawn from the accidental Introduction of the vague Word " Family" supposes a Change of Intention, before the Testator came to the End of the Will; clearly in the former Part pointing to Children; to which the Word " Family," as here used, must be considered synonymous; and the Court will not imply Contradiction from Expressions, that may be reconciled.

As to the second Question, whether this is to be considered as an Appointment to a Child, or to Grand-children, the Principle of the Cases cited is, that the Appointment was a direct Gift to the Child; who was competent to make that Settlement, carving out of it an Interest for

the

1813.
WHITE
v.
ST. BARBE.

the Children of that Child. The Distinction of this Case is, that the Daughter had not the Capacity of making a Settlement; as this was, not a present Interest, which she and her Husband might have settled, but an Interest in Remainder, expectant on the Death of her Mother; which they were not competent to deal with. The Author of this Power expresses his Object, personal to the Children, to secure their good Behaviour; and the Court will not without clear Words extend it beyond the Reason assigned. The Interests are vested, subject to be devested by a proper Appointment; and this Instrument cannot be separated; taking it first as an Appointment, and secondly as a Declaration of Trust.

Sir *Samuel Romilly* in Reply observed, that this was just such a Settlement as the Court would have directed; and, though, it is true, the Wife had not the Power of making such a Settlement, if an Appointment had been made to her, the Husband could have done it.

The MASTER *of the* ROLLS (preventing farther Reply.)

The last Argument, that the Appointment and Settlement was all one Act, and could not be separated, by considering it first as a good Appointment, and secondly, a Declaration of Trust, would have applied equally in the Cases cited; for there was no direct Appointment to the Child, and afterwards a Settlement: but it was one Act; putting the whole into Settlement at once by Consent of all the Parties.

Husband can dispose of his Wife's Property in Expectancy against every one but the Wife surviving.

Why could not the Husband in this Case make the Settlement? A Husband can dispose of such Property of his Wife in Expectancy against every one but the Wife surviving; and this is just such a Settlement as the Court would have directed. The Question is, whether all Parties,

1813. WHITE v. ST. BARBE.

ties, having any Power over the Fund, have not concurred in this Disposition of it. The Wife could make the Appointment; and the Husband could make the Settlement; and he is a Party to the Deed. It falls precisely within the Principle of *Routledge* v. *Dorril* and *Langston* v. *Blackmore*.

The Decree was made according to the Prayer of the Bill.

ROLLS. 1813, *Feb.* 17, 18.

PENNINGTON *v.* PENNINGTON.

Construction of a residuary Devise, as including under the general Words "Estate "and Effects" a Copyhold, not surrendered, in Favor of a younger Son, subject to Debts, the Will reciting, that the eldest Son was provided for; and no Freehold Estate.

SIR *John Pennington*, Baronet, by his Will, dated the 20th of *April*, 1792, giving certain Annuities, which he directed should be issuing out of his Manors, &c. situate in the County of *York*, subject thereto, devised all his Manors, &c. to Trustees, to the Use of his Son Lord *Muncaster* and his Issue in strict Settlement, with Remainders to his Son *Lowther Pennington* and his Issue in strict Settlement, with Reversion to the Testator's right Heirs for ever; and after giving some specific Legacies, the Will proceeds as follows:

" And as to all the Residue and Remainder of my " Estate and Effects not hereinbefore by me disposed of " after Payment of my just Debts and Funeral Expences " with the due Payment whereof I hereby charge all my " Estate and Effects as well real as personal and subject " thereto

"thereto I give devise and bequeath the same and every "Part thereof unto my said Son *Lowther Pennington* his "Heirs Executors and Administrators according to the "Nature of such residuary Estates having already amply "provided for my said Son Lord *Muncaster* out of my "Estates in the several Counties of *Cumberland, Westmoreland* and *Lancaster*."

The Bill was filed by a Bond Creditor; who was also one of the Annuitants, and a specific Legatee in the Will.

The Master's Report stated, that the Testator died, seised to him and his Heirs of a Copyhold Estate; which was not surrendered to the Use of his Will; and therefore according to the Custom of the Manor descended to Lord *Muncaster*, as the eldest Son and Heir; and that the Testator did not die seised of any other real Estate than that, which was devised, and limited in strict Settlement by his Will. The Questions were, whether the Copyhold Estate passed under the residuary Clause to *Lowther Pennington*; and whether it was the Fund, out of which the Plaintiff's Debt was to be paid.

Mr. *Richards*, and Mr. *Hall*, for the Plaintiff: Mr. *Hart*, and Mr. *Roupell*, for the Defendant *Lowther Pennington*.

It cannot be contended, that the Annuitants, the specific Devisees, or those, to whom the real Estates are given in strict Settlement, ought to contribute to this Debt; which ought to fall on this Copyhold Estate, passing in Equity, though not at Law, under the residuary Clause. It appears by the Master's Report, that the Testator had no real Estate whatever, except that, which he has limited in

1813. WHITE v. ST. BARBE.

ties, having any Power over the Fund, have not concurred in this Disposition of it. The Wife could make the Appointment; and the Husband could make the Settlement; and he is a Party to the Deed. It falls precisely within the Principle of *Routledge* v. *Dorril* and *Langston* v. *Blackmore*.

The Decree was made according to the Prayer of the Bill.

ROLLS. 1813, *Feb.* 17, 18.

PENNINGTON *v.* PENNINGTON.

Construction of a residuary Devise, as including under the general Words "Estate "and Effects" a Copyhold, not surrendered, in Favor of a younger Son, subject to Debts, the Will reciting, that the eldest Son was provided for; and no Freehold Estate.

SIR *John Pennington*, Baronet, by his Will, dated the 20th of *April*, 1792, giving certain Annuities, which he directed should be issuing out of his Manors, &c. situate in the County of *York*, subject thereto, devised all his Manors, &c. to Trustees, to the Use of his Son Lord *Muncaster* and his Issue in strict Settlement, with Remainders to his Son *Lowther Pennington* and his Issue in strict Settlement, with Reversion to the Testator's right Heirs for ever; and after giving some specific Legacies, the Will proceeds as follows:

" And as to all the Residue and Remainder of my " Estate and Effects not hereinbefore by me disposed of " after Payment of my just Debts and Funeral Expences " with the due Payment whereof I hereby charge all my " Estate and Effects as well real as personal and subject " thereto

1813.

PENNINGTON
v.
PENNINGTON.

" thereto I give devise and bequeath the same and every " Part thereof unto my said Son *Lowther Pennington* his " Heirs Executors and Administrators according to the " Nature of such residuary Estates having already amply " provided for my said Son Lord *Muncaster* out of my " Estates in the several Counties of *Cumberland, West-* " *moreland* and *Lancaster*."

The Bill was filed by a Bond Creditor; who was also one of the Annuitants, and a specific Legatee in the Will.

The Master's Report stated, that the Testator died, seised to him and his Heirs of a Copyhold Estate; which was not surrendered to the Use of his Will; and therefore according to the Custom of the Manor descended to Lord *Muncaster*, as the eldest Son and Heir; and that the Testator did not die seised of any other real Estate than that, which was devised, and limited in strict Settlement by his Will. The Questions were, whether the Copyhold Estate passed under the residuary Clause to *Lowther Pennington*; and whether it was the Fund, out of which the Plaintiff's Debt was to be paid.

Mr. *Richards*, and Mr. *Hall*, for the Plaintiff: Mr. *Hart*, and Mr. *Roupell*, for the Defendant *Lowther Pennington*.

It cannot be contended, that the Annuitants, the specific Devisees, or those, to whom the real Estates are given in strict Settlement, ought to contribute to this Debt; which ought to fall on this Copyhold Estate, passing in Equity, though not at Law, under the residuary Clause. It appears by the Master's Report, that the Testator had no real Estate whatever, except that, which he has limited in

 strict

1813.
PENNINGTON
v.
PENNINGTON.

strict Settlement. There is nothing, therefore, but this Copyhold to satisfy the Words of the residuary Clause; though if there had been any Freehold Estate to satisfy that Clause, the Construction must have been different. The Cases upon this Subject, which are very numerous, establish this Proposition, that the Terms "real Estate" shall carry Copyholds, where there is no Freehold Estate: *Bullock* v. *Bullock (a)*, *Ross* v. *Ross (b)*, *Ithell* v. *Beane (c)*, *Byas* v. *Byas (d)*, *Lindopp* v. *Eborall (e)*, *Drake* v. *Robinson (f)*, *Judd* v. *Pratt (g)*, and *Church* v. *Mundy (h)*. The Proposition, that the Heir shall never be disinherited but by express Words or necessary Implication, does not stand in the Way: the Testator having indicated, that he had amply provided for Lord *Muncaster*; who was his Heir at Law; and the Language of the residuary Clause being sufficiently strong to disinherit the Heir as to the Copyhold in question.

If against an Heir unprovided for this Court will not supply a Surrender, it will for a younger Son, provided for, if the Heir also has a Provision. That a Provision for the younger Son makes no Difference is expressly decided in *Cook* v. *Arnham (i)*.

Sir *Samuel Romilly*, and Mr. *Bell*, for the Defendant Lord *Muncaster*.

There is an evident Distinction between the Cases of Children and Creditors: in the former the Freehold Estate,

(a) 6 *Vin.* Ab. pl. 19.
(b) 1 Eq. Ca. Ab, 124, pl. 14 (Ed. 1739.)
(c) 1 *Ves.* 215.
(d) 2 *Ves.* 164.
(e) 3 *Bro. C. C.* 188.
(f) 1 *P. Wms.* 443.
(g) 13 *Ves.* 168, and 15 *Ves.* 390.
(h) 12 *Ves.* 426, and 15 *Ves.* 396.
(i) 3 *P. Wms.* 383.

whatever

1813.

PENNINGTON v. PENNINGTON.

whatever its Value, satisfy the Intention; but as to the latter the Amount of the Debts is to be considered in providing a Fund for their Liquidation *(a)*. This is not the Case of a Surrender to be supplied for Creditors, the Property, not specifically devised, being more than sufficient to answer the Debts. The only Question is, whether the Testator has by the residuary Clause devised his real Estate; and it cannot be maintained, that he has. The only Effect of that Clause is to bequeath his personal Property to *Lowther Pennington*. The Expression "the "same and every Part thereof" applies only to the "Estate "and Effects," the Disposition of which begins the Clause, and not to the Terms "real and personal," on which he had charged his Debts, &c.; and the Words "according to the Nature of such residuary Estates" were probably used without any definite Meaning. Though the Word "Estate," standing alone, has with reference to the Context, been held to carry real Estate, yet, when coupled with "Effects," it has been always confined to personal Property. The Argument, that here is no real Estate to satisfy the residuary Clause, is opposed by the ultimate Reversion of the Estates, devised in strict Settlement.

The MASTER *of the* ROLLS.

This appears to me to be a plain Case. The Clause, I agree, is to be read with an Exclusion of the Parenthesis; for the Words "the same" refer not to "all my "Estate and Effects as well real as personal," but to "the "Residue and Remainder of my Estate and Effects not "hereinbefore

(a) See as to this Distinction Lord C. *Eldon*'s Judgment in *Judd* v. *Pratt*, 15 *Ves.* 394, the Argument in *Church* v. *Mundy*, 15 *Ves.* 397, and the Cases there referred to, of *Byas* v. *Byas*, and *Lindopp* v. *Eborall*.

1813.

PENNINGTON v. PENNINGTON.

"hereinbefore by me disposed of." Stopping here, there might be some Ambiguity from coupling the Word "Estate" with "Effects:" but upon the whole of the Clause there is no fair Doubt of the Meaning: "And as to "all the Residue and Remainder of my Estate and Effects "not hereinbefore by me disposed of after Payment of "my just Debts and Funeral Expences, (with the Pay-"ment whereof I hereby charge all my Estate and Effects "as well real as personal) and subject thereto I give "devise and bequeath the same and every Part thereof "unto my said Son *Lowther Pennington* his Heirs "Executors and Administrators according to the Nature "of such residuary Estates." That is, he gives his residuary Estates, of different Natures. The Devisee and his Heirs are to take some: the Devisee and his Executors, others, according to their respective Natures. He must have intended to include all, whether real or personal, in this residuary Clause.

ROLLS. 1813, *Feb.* 15, 19.

MAUGHAM *v.* MASON.

Devise of Freehold Estate in Trust to sell and apply the Money towards Payment of the Legacies: the Residue of the personal Estate after Payment of Debts, Legacies, &c. upon Trust to convert all the said Residue of his personal Estate into ready Money, to be laid out in Freehold Property, to be settled.

The personal Estate leaving a Residue beyond the Charges, the real Estate a resulting Trust for the Heir at Law; and charged with the Legacies, not primarily, but only as an auxiliary Fund to the personal Estate.

CHARLES Pryor, being seised of Freehold Chambers in *Lincoln's Inn*, by his Will, dated the 16th of *March*, 1774, devised them to Trustees and their Heirs,

upon

upon Trust to sell, and to apply the Money arising by such Sale "towards" Payment of the Legacies, by his Will bequeathed; and the Rents and Profits thereof, until sold, to be applied to the same Uses; and after giving Two pecuniary and some specific Legacies as to for and concerning all the rest, Residue, and Remainder, of his personal Estate of what Nature or Kind soever, after Payment of his just Debts, Legacies, and Funeral Expences, he bequeathed the same unto his Trustees, their Executors, Administrators and Assigns, upon Trust to convert all the said rest and Residue of his personal Estate into ready Money, and to lay out the same in the Purchase of Freehold Property; which the Trustees were to settle during the natural Life of the Testator's Niece *Cecilia*, the Wife of *John Maugham*, upon Trust for her separate Use, with Remainder to her Sons in Tail-male in strict Settlement and Remainders over. He appointed his Trustees Executors.

1813.

MAUGHAM *v.* MASON.

The Executors paid all the Debts, Funeral Expences, and Legacies, out of the personal Estate; not making Sale of the Chambers; and leaving a Surplus of £580 Stock, the Residue of the personal Estate.

The Plaintiff, the Grandson of *Cecilia Maugham*, deceased, claiming under the Limitation to her Sons in Tail-male, filed the Bill; praying, that the Freehold Chambers might be sold; and the Produce together with the £580 Stock laid out in the Purchase of Lands, to be settled according to the Directions of the Will.

The Heiress at Law of the Testator submitted by her Answer, that, if the Court should be of Opinion, that the Freehold Chambers were liable to make good the Legacies,

1813. MAUGHAM v. MASON.

Legacies, they were liable only to the Extent of the Deficiency of the personal Estate; and if such Freehold Estate was primarily liable to pay the Legacies, then she claimed to be entitled to the Surplus.

Mr. *Richards*, and Mr. *Lovat*, for the Plaintiff.

There are Two Questions: first, whether the Chambers are not converted out and out into personal Estate: secondly, whether the Chambers are not primarily liable to pay the Legacies. With respect to the first Point, this is not a Question between the Heir, and the next of Kin, but between the Heir, and the residuary Legatee: a Distinction, expressly taken in the learned Argument of *Ackroyd* v. *Smithson* (a) founded in the Difference between the Case of Intention apparent, and the Absence of Intention.

Secondly, this Testator, as in *Hancox* v. *Abbey* (b), clearly indicates, that the Chambers should be the first Fund for Payment of his Legacies; and the Introduction of the Word "Legacies" in the residuary Clause is not inconsistent with this Construction; proceeding on the Presumption, that the Produce of the Chambers might not be sufficient. There is no Pretence for considering this a Charge upon the Chambers merely to supply the Deficiency of the personal Estate: it is both in Terms and Substance a Devise in the first Instance to pay the Legacies; and though the Testator uses the Word "towards" his Meaning is "in" Payment. If any Reliance is placed on the Word "personal" in the residuary Clause, that Word is to be found also in *Mallabar* v.

(a) 1 *Bro. C. C.* 503, see particularly 507 to 512.

(b) 11 *Ves.* 179.

Mallabar,

1813. MAUGHAM v. MASON.

Mallabar (*a*), and in *Durour* v. *Motteaux* (*b*); as appears by the *Register*'s Book (*c*); and that Will had no such Words as "and Performance of my Will," or any other Expression more favorable to the residuary Legatee. So the Words "personal Estate" in the residuary Clause of this Will must be understood not merely the personal Property in a strict Sense, but as comprising also the Produce of this real Estate.

Mr. *Leach*, and Mr. *Wingfield*, for the Heiress at Law.

If any Distinction really exists between the Cases of next of Kin and residuary Legatee, contending with the Heir at Law, it is difficult to assign a Reason for it, that will be satisfactory and consistent with the settled Rule, that the Heir shall never be disinherited but by express Words or necessary Implication. The Cases of *Mallabar* v. *Mallabar* and *Durour* v. *Motteaux* turned upon the peculiar Expressions used in those Wills; creating a compleat Conversion out and out, turning the Whole into personal Property; and the Word "Residue", therefore, applied to both. This Charge on real Estate, merely "towards" Payment of the Legacies, falls under the common Principle, that a Gift to a certain Extent, not

(*a*) *For.* 78.

(*b*) 1 *Ves.* 320.

(*c*) Mr. *Lovat* stated this Will from the *Register*'s Book thus: The Testator gave all his real and personal Estate (by the Description of all his Lands, Tenements, and Hereditaments, Stock in Trade, Debts, &c.) to Trustees upon Trust to sell and dispose thereof, and thereout to pay all the Testator's Debts and Funeral Expences and the Legacies and Gifts by the said Will given, and place out and invest the *Residue* of his "*Personal*" Estate upon Securities, and divide among several Persons.—Reg. Lib. 1749, Book A. Fol. 253.

exhausting

1813.
MAUGHAM
v.
MASON.

exhausting the whole beneficial Interest, leaves a resulting Trust for the Heir at Law *(a)*. The real Estate is not primarily liable. The Case of *The Duke of Ancaster* v. *Mayer (b)* has settled, that a mere Charge on the real Estate will not exonerate the personal Estate; which is not exempted, but only receives Aid from the real Estate. The Words of this Will are not stronger; and call for no different Construction. Another settled Rule is, that where there is a Charge on both Funds, the real Estate shall never be held primarily liable; exempting the natural Fund, the personal Estate. In *Hancox* v. *Abbey* the general Rule was admitted; but that Case was taken out of it by the Intention indicated as to the £2000.

Mr. *Richards*, in Reply.

There is a solid Difference between the Cases of the next of Kin, and the residuary Legatee, conflicting with the Heir: the residuary Clause raising the Inference, which the other Case wants, that the Heir was disinherited. The Intention, clearly indicated, must, as in *Mallabar* v. *Mallabar* and *Durour* v. *Motteaux*, give the Surplus to the residuary Legatee: but taking this not to be a Conversion out and out, it is a Devise for a particular Purpose, and within *Hancox* v. *Abbey*.

The MASTER *of the* ROLLS.

Two Questions were made in this Cause: first, whether the real Estate is not so absolutely converted into personal as to pass by the residuary Clause under the Denomination of personal Estate: secondly, whether, if it does not so

(a) See *Hill* v. *Cock*, *Ante*, 173, and *King* v. *Denison*, *Ante*, 261.

(b) 1 *Bro. C. C.* 454.

pass, it be not at least the primary Fund, out of which the Legacies are to be paid.

The Testator directs his Trustees to sell his Chambers, the only real Estate he is stated to have had, and to apply the Money, arising by such Sale, towards Payment of the Legacies by his Will, bequeathed. Stopping here, it would be impossible to contend, that what remains after Payment of the Legacies, would not be a resulting Trust for the Heir; no Disposition being made of the Surplus Produce of the Sale after Payment of the Legacies; and no Purpose being expressed, for which the Sale is directed, beyond Payment of them.

The Testator then gives some specific Legacies of Stock; which of course cannot be the Legacies, to which the Produce of the Sale of the real Estate is to be applied. There are only Two pecuniary Legacies; one of £1000; and Twenty Guineas to one of his Executors. Of Two Stock Legacies, given only for Life, he directs the Trustees upon the Death of each Legatee to sell the Capital; and to lay out the Produce in Freehold Lands and Tenements, to be settled to the same Uses as the Lands afterwards directed to be purchased with the rest and Residue of the personal Estate. The residuary Clause is thus expressed:

" And as, for and concerning, all the rest, Residue, " and Remainder, of my personal Estate of what Nature " or Kind soever after Payment of my just Debts, Legacies " and Funeral Expences," he bequeathed to his Trustees, their Executors, &c. upon Trust, to convert all the rest and Residue of his personal Estate into ready Money, and to lay out the same in the Purchase of Freehold Property; which the Trustees were to settle; and then he proceeds to declare the Trusts.

The

1813.

MAUGHAM v. MASON.

The Observation is perhaps minute, that the Money, produced by the Sale of the real Estate, could not with propriety be spoken of as personal Property to be converted into Money: at most however this is a general Bequest of the Residue of his personal Estate; and the Question is, what was meant to be included under that Description. Properly speaking nothing is the personal Estate of a Testator, that was not so at his Death. He may certainly so express himself as to shew, that something else was intended: but, where there is nothing but a Direction to sell Land, with Application of the Money to a particular Purpose, and a subsequent Bequest of the rest and Residue of the personal Estate, I know of no Case, in which it has been held, that the Surplus, after the particular Purpose is answered, forms Part of the personal Estate; so as to pass by the residuary Bequest. The mere Disposition of the Residue of personal Estate can never solve the Question, what is personal Estate. The Clause may be so conceived as to shew the Sense, in which those Words are used: but here is nothing more than those Words, unaccompanied with any Thing explanatory of the Sense, in which they were used.

Properly nothing is the personal Estate of a Testator, that was not so at his Death: he may so express himself as to shew something else intended; but where there is nothing but a Direction to sell Land with an Application of the Money to a particular Purpose, there is no Instance of holding the Surplus, after that Purpose answered, to form Part of the personal Estate, so as pass by the residuary Bequest.

It must therefore be contended broadly in this Case, that, wherever a Will contains a Direction to sell real Estate, and also a residuary Bequest of personal Estate, there can be no resulting Trust for the Heir.

The Cases of *Mallabar* v. *Mallabar* (a) and *Durour* v. *Motteaux* (b) have never been understood to establish any such Proposition. In the former, though those Two Circumstances concurred, they were not relied upon either in the Argument or the Decision. Lord *Talbot* at first resorted to parol Evidence; but afterwards, thought, the Intention might be satisfactorily collected from the Will itself.

(a) *For.* 78. (b) 1 *Ves.* 320.

Durour

1813.
MAUGHAN v. MASON.

Durour v. *Motteaux* does not perhaps furnish so strong an Indication of Intention. From the little Lord *Hardwicke* is reported to have said it is difficult to ascertain, from what Expressions he inferred, that by the Description of all his personal Estate the Testator meant to include every Thing in the Residue. If any Stress is to be laid upon the Word "all," that Word does not occur here: but that Decision is generally accounted for by the particular Manner, in which the Sale was directed, and the Circumstance of the Testator's having blended together the real and personal Estates in one Gift to Trustees, to sell the whole with his personal Estate, &c.

The blending the two Estates together has always been considered as furnishing an Argument for the entire Conversion of the real into personal: an Argument, which is wholly wanting in this Case. It was observed (by Mr. *Lovat)* that this Circumstance cannot be considered as very decisive of the Intention either Way; as, though they were blended together in *Ackroyd* v. *Smithson (a)*, yet the Heir succeeded in his Claim. There the Question was, not, whether the Testator meant to dispose of real Estate as Personalty; for he had done so in express Terms; but, whether it was to be converted for any other Purpose than the precise Disposition expressed. That Case decides, that it is not in every Instance, where the Estates are blended, that the Heir is excluded; but not, that without that Circumstance, or some equivalent Indication of Intention, the Claim of the residuary Legatee can prevail. The Want of a Circumstance may be very material in the one Way; although the Existence of it would not be decisive in the other. I can find nothing in this Will, that furnishes a sufficient Indication of the Intention of the Testator to make an absolute Conversion of his real into personal Estate.

(a) 1 *Bro. C. C.* 503.

1813.
MAUGHAM
v.
MASON.

As to the other Question, I do not see, how it can possibly bear an Argument: so numerous are the Cases, in which much stronger Words have been held insufficient to exempt the personal Estate, or to make the real primarily liable. Some Stress was laid on the Circumstance, that it is towards the Payment of Legacies only that the Produce of the real Estate is to be applied. From a Direction to pay a particular Debt, or a particular Legacy, in Contradistinction to other Debts and other Legacies, the Argument, used in *Hancox* v. *Abbey* (a), may fairly enough arise, but where it is to pay Debts generally, or Legacies generally, there is no Room for its Application. Although in the subsequent Part of his Will the Testator gives only two pecuniary Legacies, of any Amount, yet, if he had given ever so many, they would all have been equally charged on the real Estate; but charged in Aid of the Personal; and not in Exclusion of it, or in Priority to it.

Upon both Points therefore my Opinion is in favour of the Heir at Law.

The Bill was dismissed without Costs.

(a) 11 *Ves.* 179.

LORD

1813. Lincoln's Inn Hall, Feb. 22.

LORD MILSINGTOUN v. EARL OF PORTMORE.

The Right to the Letter Missive and Copy of the Bill is Privilege of Peerage, not of Parliament attaching therefore to all *Scotch* and *Irish* Peers. Injunction therefore, or other Process, not so accompanied, is ineffectual.

THE Plaintiff having obtained an Injunction without serving the Defendant with a Letter Missive and Office Copy of the Bill, a Motion was made to dissolve the Injunction; or that the Plaintiff might be directed at his own Expence to furnish the Defendant with an Office Copy of the Bill.

Mr. *Hart*, Mr. *Leach*, and Mr. *Hall*, in support of the Motion.

The Defendant is not bound to put in an Answer, until he has been served with a Letter Missive, and an Office Copy of the Bill; and this Injunction having issued without either is a Nullity.

It may be questioned, whether this is not a Breach of Privilege. The Privilege of Peerage, limited as it is by modern Statutes (a), still requires, as an indispensible Condition, Service of the Letter-Missive, and Copy of the Bill, accompanying at least, if not preceding, any Order of the Court; and in this Respect there is no Distinction between an *English* and a *Scotch* Peer: the Privilege attaching to the Defendant as a Peer; not as a Member of the Upper House of Parliament. *Robinson* v. *Lord Rokeby* (b) has decided, that *Irish* Peers, with the Exception of those in the House of Commons, are entitled to every Privilege of the Peerage, except that of

(a) Stat. 12 and 13 *Will.* 3 c. 3. Stat. 11 *Geo.* 2. c. 24.

(b) 8 *Ves.* 601.

1813.
Lord MILSINGTOUN v. Earl of PORTMORE.

sitting in the House of Lords (a): and therefore to the Letter Missive.

Sir *Samuel Romilly*, for the Plaintiff, said, the Application in *Robinson* v. *Lord Rokeby* was not opposed: and Orders had been frequently made, that upon the Service of an Injunction on a Peer a Letter Missive should accompany it.

The Lord CHANCELLOR.

This is Privilege of Peerage, not Privilege of Parliament. In this Respect therefore there is no Distinction between *English*, *Scotch*, and *Irish*, Peers: all being entitled equally to Privilege of Peerage; though only those, who are in Parliament, can have Privilege of Parliament. In both the Acts of Union the Peers in Parliaments, the 16 and the 48, have the same Privileges as the *English* Peers; with the Exception of those, who did not take the Oaths; with regard to whom there was a considerable Question as to their franking.

If they have the same Privilege of Peerage, though not of Parliament, what is their Privilege as to this Question? With regard to that I am bound to consider every Peer entitled to this Privilege, who does not, as many do, voluntarily waive it. The Question then is as to the Effect of the Injunction. I doubt, whether it has any Validity, unless accompanied with the Letter Missive and a Copy of the Bill. I will consult the *Master of the Rolls* upon it: but at present I think, I ought not to make the Order; conceiving the Injunction to be good for nothing. If a Peer is entitled to an Office Copy of the Bill, and insists upon it, I do not see, how this Court can make any Process effectual against him, until that is done. I had taken

(a) See Stat. 39 and 40 *Geo.* 3. c. 67.

it,

1813. Lord MILSINGTOWN v. Earl of PORTMORE.

it, that this Practice was much older than the Statute of *William* 3. The Letter Missive and Copy of the Bill I take to be very antient. There is one Instance of it in a very early Stage of the *Banbury* Case."

Sir *Samuel Romilly*, for the Plaintiff, then waived the Point; and consented to serve a Copy.

Before *The Lord Chancellor.* 1812, *Feb.* 25, 26. With the Judges 1812, *June* 15. 19. 26. 29. 1813, *Feb.* 10. *March* 1. *April* 13.

Under a Devise by a married Man, having no legitimate Children, "to the Children which I "may have by "*A.* and living at my "Decease," natural Children, who had acquired the Reputation of being his Children by her before the Date of the Will, entitled, as upon the whole Will intended, and sufficiently described; rejecting, as a Description of the Devisees, Passages in a written Book, unattested; of which Probate was admitted under a Reference in the Will to "the Observations and Directions, which "I shall leave in a written Book."

Whether, if there were also legitimate Children by the same Mother, they could take together under the same Description, and whether future illegitimate Children can take under any Description in a Will, *Quære.*

WILKINSON *v.* ADAM.

The Lord Chancellor.
Sir Alexander Thompson, Baron.
Sir Simon Le Blanc, } Justices.
Sir Vicary Gibbs, }

JOHN *Wilkinson* by his Will, dated the 29th of *November*, 1806, devising to his Wife *Mary Wilkinson* for Life his Mansion at *Castle Head*, and declaring, that such Devise, together with the Annuity given to her, was to be taken in lieu of Dower, and giving her an Annuity of £500, charged on his real Estates and Iron Works thereinafter devised, and also giving her the Use of his Household Goods, &c. at his Mansion at *Castle Head*, proceeds as follows:

"And from and after the Decease of my said Wife I "give and devise unto *Ann Lewis* (who now lives with "me) during the Term of her natural Life provided she so "long continues single and unmarried but not otherwise "all that my said Mansion House at *Castle Head* with "the Appurtenances. Also I give and devise to the said "*Ann Lewis* (subject to the Proviso aforesaid) the Use of

"all

"all my Household Goods, Plate, Furniture, and other "Chattels of what Kind soever, being at my Mansion "House at *Castle Head* aforesaid for her Life which "Devises are for the separate and peculiar Use Benefit "and Enjoyment of the said *Ann Lewis* during the Term "and on the Proviso aforesaid and are to be looked upon "as entirely distinct from and having no Reference to the "joint Trust wherewith she is hereinafter intended to be "invested by this my Will."

The Testator then devises all his real and personal Property (except what he had before given to his said Wife and *Ann Lewis* for their respective Lives) to the said *Ann Lewis, James Adam, William Vaughan, Cornelius Reynolds*, and *Samuel Fereday*, for Thirty-one Years, to commence from his Decease, upon several Trusts; the last of which is to purchase Lands of Inheritance; to be limited during the Term of Thirty-one Years to such and the same Uses, and upon the same Trusts, with those of the Testator's Estates of Inheritance, thereby devised to them in Trust; and he then proceeds in the following Words;

"And from and after the Expiration of such Term to "the Children which I may have by the aforesaid *Ann* "*Lewis* and living at my Decease or born within Six "Months after equally to be divided between such Children "and their Heirs Share and Share alike and if but one such "Child to such only Child and his or her Heirs for ever; "and if no such Child or Children be living at my Death "or born within Six Months after my Decease, as afore-"said, to my Nephew *Thomas Jones* and his Heirs for "ever; and if the said *Thomas Jones* shall at the Time "of such Purchase be dead, in that Case to such "Person as shall be the Heir of the said *Thomas Jones*, "and to his, her or their, Heirs for ever;" and after the Expiration of the said Term of Thirty-one Years he

1812-13.
WILKINSON
v.
ADAM.

devised all other his Estates, &c. in the following Words:

"To the Use and Behoof of the Child or Children "which I may have by the said *Ann Lewis* as above "mentioned to be divided equally between them Share "and Share alike, and his, her or their Heirs for ever; and "in Default of such Child or Children born to me as "aforesaid, then to the Use and Behoof of my said "Nephew *Thomas Jones* and his Heirs for ever provided "he or they do take the Name of *Wilkinson*; and in "case I leave any Child or Children by the said *Ann* "*Lewis* then I give and bequeath to my said Trustees for "each and every such Child *per* Year during the Conti- "nuance of the said Term of Thirty-one Years such a "Sum of Money as they or the major Part of them in "their Discretion shall think adequate and sufficient for "the Support Maintenance Education and bringing up of "such Child or Children which I may have by the said "*Ann Lewis* as aforesaid during so long of the said "Term as he she or they may happen to live but not to "exceed the Sum of £200 in each Year for each and "every such Child or Children; and it is my Will and I "do hereby expressly limit give and appoint the said Sum "of £200 *per* Year to the said *Ann Lewis* for her own "peculiar and separate Use for her Care Management and "Guardianship of the said Children during such Time as "she continues such Guardianship; and I charge my "Estates with the Payment thereof accordingly."

After directing, that his Trustees should at the Expiration of the said Term of Thirty-one Years, render an Account to the Persons then entitled in Reversion or Remainder to his several Estates of Inheritance so devised or purchased, and assign and deliver his Leasehold and personal Property, he proceeds thus:

"And

1812-13.
WILKINSON v. ADAM.

"And it is my Will and I do hereby direct that im-
"mediately after the Expiration of the said Term of
"Thirty-one Years all my real and personal Estate and
"Effects not hereinbefore by this my Will otherwise dis-
"posed of shall be vested in the Child or Children which
"I may have by the said *Ann Lewis* as above-mentioned
"(except such Part thereof as is before devised to the said
"*Ann Lewis* for her own Use during her natural Life
"and continuing single and unmarried) and his her or their
"Heirs for ever Share and Share alike and in Default of
"such Child or Children born to me as aforesaid then the
"same to vest in the said *Thomas Jones* his Heirs Exe-
"cutors Administrators and Assigns to his and their own
"Use upon the Condition aforesaid. And it is my Will
"and I do hereby farther direct that immediately on the
"Decease or Marriage of the said *Ann Lewis* (which
"shall first happen) the Mansion House at *Castle Head*
"and also the Household Goods and Furniture so de-
"vised to her as aforesaid shall vest in my said Child or
"Children born to me by her as aforesaid equally between
"them and in Default of such Issue then to the said
"*Thomas Jones* his Heirs Executors Administrators and
"Assigns upon the Condition aforesaid."

The Testator then appointed *Ann Lewis* Executrix, and his other Trustees Executors of his Will; and having directed the Legacies, in a Schedule, annexed to his Will, to be paid, requests, that his Body may be privately interred in his Garden at *Castle Head* in a Place, prepared for that Purpose, or within a Building called the Chapel at *Brymbo*, or in his Garden at *Bradley*, "in such Manner
"as is directed in the Book hereinafter referred to, and at
"the nearest of the said Places where I shall happen to
"die. Lastly it is my earnest Wish and Desire that the
"Observations and Directions which I shall leave (in a
"written Book) for the better Improvement of my Estates
"and

1812-13.
WILKINSON
v.
ADAM.

"and carrying on the different Works as well as other "Matters be followed and attended to as much as if they "were inserted in this my Will."

The Will was re-published on the 26th of *March*, 1807, and the 5th of *January*, 1808: in each Instance in the Presence of Three subscribing Witnesses; and on the latter Occasion, he added a Codicil; directing, that the Term of the Trust should be for Twenty-one Years from his Decease instead of Thirty-one Years.

On the 6th of *January*, 1808, the Testator added another Codicil substituting *William Smith* in the Place of *Reynolds* as a Trustee and Executor; and at the same Time he re-published his Will; in each Instance stating, that he re-published "the Contents of this and "the preceding" Eight or Nine Sheets as and for his last Will and Testament.

The Testator died in *July*, 1808; and upon his Death a Manuscript Book was found; containing with a great Variety of other Matter Eight Entries, not attested so as to pass real Estates, but which were proved in the Prerogative Court of *Canterbury* as testamentary. Some of those Entries were as follows:

"Register of my Children by *Ann Lewis* which for "more certainty is entered by *John Wilkinson*; *Mary* "*Ann*, born *July* 27th, 1802, about Eleven o'Clock; "*Johina*, born *August* 6th, 1805, about Four o'Clock; "*John*, born *October* the 8th, 1806, Half past Eight "o'Clock in the Morning."

"*Bradley*, *March* 26th, 1807. Whereas in my last "Will and Testament re-published this Day it is limited "that the Child or Children which should be entitled to "Co-shares

" Co-shares of my Estate real and personal as is more " fully explained there should be born to me of the " Body of *Ann Lewis* within Six Months of my Decease. " Now I do hereby declare that such Limitation as to " Time should not operate absolutely to the Deprivation " of any Child or Children which may be born of the " Body of the said *Ann Lewis* within the utmost Bounds " (after my Decease) prescribed by Law for Gestation " and I therefore hereby authorize my said Trustees to " make such Provision for such Child or Children, if any " such there be, as they or the major Part of them may " think right according to the Circumstances of the Case; " and farther least Doubts should arise as to the Expres- " sion 'Children born to me by the said *Ann Lewis*' I " hereby declare that my Meaning is to include a Daughter " of said *Ann Lewis* called *Mary Ann*, now about Five " Years old, another Daughter of the said *Ann Lewis* called " *Jonina*, now about Two Years old, and a Son of the said " *Ann Lewis* called *John*, about Six Months old; and " farther; whereas in my said Will it is expressed that the " said *Ann Lewis* should have for her own peculiar and " proper Use £200 during the Time of her Guardianship " of my said Child or Children my Intention was and is " that such Annuity should continue to her during her " natural Life provided she remains so long unmarried in " the same Manner as my Bequest to her of my Mansion " House and Appurtenances at *Castle Head* and on pre- " cisely the same Conditions; my Idea being at the Time of " making my Will that she should be considered the " natural Guardian of her Children during Life. This " Explanation is therefore given to prevent a different " legal Construction being put on that Term or Expres- " sion."

" *Bradley*, 4th *June*, 1808. Memorandum. Whereas in my last Will and Testament duly published mention

1812-13.

WILKINSON v. ADAM.

"is made of *Ann Lewis* as the Guardian of my Children "by her the said *Ann Lewis*, which Expression is only to "be understood as a Mark of my Regard for her and "Wish that such Children should not be taken from her "during their tender Age for any Purpose but that of "Education, nevertheless my Intention and Will is "that in all Things of Importance and particularly in the "Education of such Children described by the Names of "*Mary Ann*, *Jonina* and *John*, or any other Children "which may be born of the Body of the said *Ann Lewis* "as in my Will particularly described the Direction and "Management should be in my said Trustees, the Survivors "of them, and of such new Trustees as may be appoint- "ed pursuant to my said Will and may choose to act, any "Thing in my said Will to the contrary in anywise not- "withstanding; and farther, I hereby express my Will "and Desire that my said Children may assume and take "the Name of *Wilkinson* in addition to their present "Name of *Lewis*, and that my Trustees would take such "Steps for that Purpose as may be requisite; and "whereas, in my Will I have mentioned that after my "Decease my Body should be buried at *Castle Head*, "*Bradley* or *Brymbo*, or such of those Places as I should "happen to be at or nearest to the Time of my Decease, "it is not to be understood that I hereby determine the "final Place of depositing my Corpse; but if I do not die "at *Castle Head* my Body in one of the Iron Cases pro- "vided for that Purpose shall be removed thither by the "first convenient Opportunity there to remain."—Signed "*John Wilkinson*."

The Testator's Wife, who died in his Life-time, in *December*, 1806, having never had any Children, he left *Mary Ann* and *Eliza Wilkinson*, the Children of his Brother, his Co-heiresses at Law; and his Nephew and Devisee *Thomas Jones*; who took the Sirname of *Wilkinson*

kinson, and filed the Bill; alledging, that *Ann Lewis* was never married to the Testator; and any Children she had by him were illegitimate; and praying, that the Will and Two Codicils may be established; and the Trusts thereof carried into Execution: that the Trustees may be decreed to convey to the Plaintiff and his Heirs the real Estate of the Testator, subject to the Estate and Interest of *Ann Lewis*; &c.

The Trustees by their Answer alleged, that the Testator previously to the Execution of his Will at Three several Times caused to be written in a certain Book certain testamentary Papers, containing Directions for the Improvement and Management of his Affairs after his Death; and on the Day of the Date of his Will he wrote another testamentary Paper in such Book; which Four testamentary Papers were proved in the Ecclesiastical Court as Codicils; that by his Will he referred to such written Book: that he left Three other Codicils in such Book; the first made soon after his Will: the second bearing Date the 26th of *March*, 1807: and the third dated the 4th of *January*, 1808: all which together with another Codicil, dated the 31st of *January*, 1808, written in such Book, had been proved in the Ecclesiastical Court: that the Testator acknowledged *Mary Ann Wilkinson*, *Jemima Wilkinson*, and *John Wilkinson*, to be his Children; and frequently declared, that he had provided for them by his Will as such. The Defendant *Ann Lewis* stated, that she cohabited with the Testator for many Years previous to and at the Time of his Death; and their Cohabitation was well known to the Testator's Wife, while she lived; the Testator being very desirous of having Children of his own, to whom he might leave his Property; and not expecting any from his Wife: that during such Cohabitation the Testator had Three Children by her, now living: namely, *Mary Ann Wilkinson*, born the 27th of *July*, 1802,

1812-13.

WILKINSON v. ADAM.

1802, at the Testator's Dwelling-house at *Bradley*: *Jonina Wilkinson*, born on the 6th of *August*, 1805, at the Testator's same Dwelling-house; and *John Wilkinson*, born the 8th of *October*, 1806, at the same House; admitting, that she never was married to him; that he always acknowledged them as his Children by her; and usually called them by his Sirname; by which they went; and they were looked upon by all Persons, acquainted with them, as the Testator's Children by her; that they were brought to and placed at his Table; and were always maintained and educated at his Expence, as being his Children. The Answer submitted, that the said Three Children, born before the Date of the Will, had, when his Will and Codicils were made, acquired Names of Reputation, and also the Reputation of being the Children of the said Testator by *Ann Lewis*: that, having acquired such Names and Reputation, and being also sufficiently designated in his Will and Codicils, they fell within the Description in his Will; or were to be considered as the Persons thereby intended; and that they were entitled to all his real and personal Estates, except what he specifically disposed of.

Another Manuscript Book was found among the Testator's Papers; which was represented as a Duplicate of that, from which the Passages, admitted to be proved as Part of the Will, were taken: but during the Argument it was said, that there was considerable Variance between them; and that the Probate had been taken, not from the Original, but from that which was supposed to be the Duplicate.

After the Argument the *Lord Chancellor* suggested, whether the Question, what Papers constituted the Will as to the real Estate, must not go to a Jury; or be stated as a Case for the Opinion of a Court of Law; his Lordship declaring, that he had no Doubt, these Books could

not

not be so considered. After some Consideration it was agreed, as the most convenient and expeditious Course, that the Case should be re-argued before the *Lord Chancellor*, assisted by some of the Judges. Upon the second Argument the Plaintiff's Counsel confined his Claim to the real Estate.

Sir *Samuel Romilly*, Mr. *Hart*, Mr. *Bell*, Mr. *Wingfield*, and Mr. *D. F. Jones*, for the Plaintiff.

The Plaintiff claims these Estates under the Will of his Uncle for Default of those Persons, to whom they are devised in Preference to him. These Defendants, whatever might have been the Testator's Intention in their Favor, are as much out of the Case, as if they were naturally dead, or had never existed. They are not to be considered as the Testator's Children. Their Title will be set up, first, upon the Will itself, and the Codicils, attested by Three Witnesses: Secondly, by an Attempt to connect with the Will Papers, relating only to the personal Estate; so as to give them Effect as to the real Estate. It is laid down certainly, that there is no Distinction between "*procreatis*" and "*procreandis*" (a); upon technical Reasoning, that the Limitation might have no Effect, if it would not include a Child already born: but the plain Construction of this Will is, that Children to be born at a future Time were intended; and there is no Devise to Children already born: but if such Children can be considered the Objects, yet, being illegitimate, there is no Description sufficient in Law to enable them to take. The Expression of the Will throughout points to future Children; and he might have looked to legitimate Children by *Ann Lewis*; who after the Death of his

(a) See *Doe* on the Demise of *James* v. *Hallett*, 1 *Maule* and *Selwyn's* Rep. 124.

1812-13.

WILKINSON v. ADAM.

his Wife was to be placed in his Mansion-house; and seems to have been regarded by him as a second Wife: a Circumstance, that strongly fortifies the Construction, that he had future Children only in his Contemplation; if the Words were not so free from Ambiguity, so clearly referring to future Children, that it is unnecessary to have Recourse to the probable Intention: "the Children which "I may have by the aforesaid *Ann Lewis*, and living at "my Decease," &c. the latter Part of the Description being restrained by the preceding Words; with which also the subsequent Expression "Children born to me," of ambiguous Import, capable of either Sense, is connected by the relative Term "such." The single Instance of Words, applicable to Children then born, is in the Direction for Maintenance, "in case I leave any Child or "Children by the said *Ann Lewis*;" which cannot have the Effect of extending by Inference the former Description, so plainly expressed.

If after-born Children were intended, they cannot possibly take. The Case of *Metham* v. *The Duke of Devonshire* (a) only confirmed what was the Law before; that illegitimate Children can take only by a Name of Reputation; which must be acquired after their Birth. If the Intention was to give to the Children he already had, those Children cannot take. A Testator cannot give either to his own illegitimate Children, or to those of another Man, otherwise than by Description; either by a Name acquired, or by some remarkable Quality or Defect; by which the Person may be distinguished; and the Rule of Law does not admit Evidence, that the Person so described is the Child of any one, if not legitimate. The Rule is laid down by Lord *Coke* (b), according to *Blodwell* v. *Edwards* (c), the

(a) 1 *P. Will* 529.

(b) *Co. Lit.* 3, b.

(c) *Cro. Eliz.* 509, *Moor.* 430. 2 *Rol.* Abr. 43. *Noy*, 35.

most

1799.

WILKINSON v. ADAM.

[illegible] Report of which [illegible] that a Bastard, having gotten a Name by Reputation, [illegible] by his reputed, or known Name to him and his Heirs; although he can have no Heir but of his Body. Then he gives an Instance, that a Bastard shall not take a Remainder under the Description of Issue; because in [illegible] not Issue; [illegible] "Qui ex *damnato Coitu* [illegible] "*Liberos non computantur*;" and, as [illegible] "Bastard is *Quasi nullius Filius*; and [illegible] "of Reputation, as soon as he is born. [illegible] "make a Lease for Life [illegible] Remainder [illegible] "eldest Issue Male of *B.* to be begotten of [illegible] "*Jane S.*, whether the same Issue be legitimate or illegitimate, and *B.* hath Issue a Bastard on the Body of [illegible] "*S.*, [illegible] Issue shall not take the Remainder [illegible] "by [illegible] Issue, if there had been [illegible] "he [illegible]; and a Bastard cannot [illegible] "hath gained a Name by Reputation, [illegible] "[illegible] &c.; and therefore [illegible] no Remainder [illegible] "before he be born; [illegible] "hath gained by Time a Reputation [illegible] "Name of a Son, then a Remainder [illegible] "Name [illegible] of his reputed [illegible] "cannot [illegible] the Remainder by the [illegible] of Issue at the "Time, when he is born, he shall never [illegible] it."

There are some Terms ambiguous [illegible] a [illegible], after he has acquired a Name by [illegible]; but it is settled, that there must be something more than a [illegible] Acknowledgment of him as the Child of [illegible], to enable a Bastard to take. The Subject received much Consideration in the Case of *Gardner v. Davis* (e); a Decision, by Lord [illegible] which [illegible] his Inclination [illegible] convinced of the [illegible] in favour of the illegitimate Children, proved [illegible] strongest Evidence of the Tes-

(e) 6 Ves. 43.

1812-13.

WILKINSON v. ADAM.

tator's great Intimacy with *Harwood* and his Family, and Knowledge, that he had no legitimate Children, and that those were treated by him as his Children. *Cartwright* v. *Vawdry* (a) is a Case of as great Hardship, and as clear Intention for the illegitimate Child, and the strongest Evidence, that she was always considered by the Father as one of his Children. In *Harris* v. *Stewart*, another Case before Lord *Loughborough*, in which your Lordship was Counsel, immediately after the Birth of an illegitimate Child the Parents married; and had several other Children: the eldest, though illegitimate, was brought up with the rest without Distinction; and was proved to have been a Favorite with the Uncle; who by his Will gave all his Property to his Sister, the Mother, for Life, and after her Decease to be equally divided among all the Children; intending certainly to include the eldest; who had no other Provision; Lord *Loughborough*, regretting, that the Person, who drew the Will, had not the Caution to name the Children, was under the Necessity of deciding with great Reluctance, that the eldest took nothing. These Cases have gone a great Way towards ascertaining the Sense of what is stated in Text Writers as to a Bastard acquiring a Name by Reputation; which must be understood as giving a Capacity to take by that Name, merely as a Description; not as a Child, by a Claim of Kindred. In a late Case, *Earle* v. *Wilson* (b), the *Master of the Rolls* upon these Authorities, laying down the Principle and Doctrine in the same Way, would not hold a natural Child entitled under the Description "such Child or Children "as *A.* may happen to be *ensient* of by me."

If this Testator had lived long enough to marry *Ann Lewis*, and had legitimate Children by her, which was the Case of *Cartwright* v. *Vawdry* and *Kenebel* v. *Scrafton* (c),

(a) 5 *Ves.* 530.

(b) 17 *Ves.* 528.

(c) 2 *East.* 530.

could

1812-13. WILKINSON v. ADAM.

could the illegitimate Children possibly have taken with the legitimate; and is the Construction to depend upon the Event? He seems to have contemplated that Event; to have considered her very much as his Wife; substituting her after his Wife's Death in the Possession of his Mansion-house, with the Household Furniture, &c; and imposing upon her the Condition not to [illegible] Intention is clear, at least, that after-b[illegible] should take; and it would be extremely [illegible] Words to hold the Devise good as to tho[illegible] and not as to those afterwards born.* The [illegible] Inconvenience and Danger of admitting Evidence to determine, who is the Father, demonstrate the Wisdom of the Rule of Law. In an Inquiry as to the Child of a married [illegible] the Fact admits no Doubt: in the other Case it [illegible] upon the Caprice of the Wo[illegible] producing all that Uncertainty in Property, to prevent which these Rules were established.

The second Question is, whether in construing this Will the Court can take into Consideration these Papers, which have been treated as Codicils: this Book, which is represented as Part of the Will, upon the Reference after the Nomination of Executors to some Book, which he will leave. It is now clearly settled, that real Estate cannot be disposed of by a Will with three Witnesses, referring to some future Instrument, not executed with the Forms and Solemnities, required by the Statute (a). The Law on that Subject is clearly recognised and confirmed in *Habergham* v. *Vincent* (b). The Reference in this Will to a written Book is confined to one Subject, the better Im[illegible] his Estate and carrying on the different [illegible] other Matters to be attended to in the Execution of the [illegible]; which must be restrained to other Matters

(a) Stat. [illegible] Ch. 2, & 3. (b) 2 *Ves.* jun. 204.

of

1812-13.
WILKINSON v. ADAM.

of the same Kind with those before specified: a mere Direction to the Trustees as to the Management of the Estate: but, if reciting, that there was some Ambiguity in his Will, he had expressly referred to some Book or Paper, to be written and executed not according to the Statute of Frauds, explaining, who were his Devisees, that could not be taken into Consideration: his Intention could not be so explained. This Book however contains nothing supplemental to the Devise, to remove the Doubts, occasioned by the imperfect Expression of his Will as to his Devisees It is a Book, in which Memorandums and Observations were made from Time to Time, and all those Parts were written after the Date of the Will. This is not therefore a Paper then existing: which might perhaps be made Part of the Will; if so clearly referred to, described and identified, by the Will as to amount to Incorporation, according to Mr. Justice *Wilson*'s Opinion (a) in *Habergham* v. *Vincent*, and your Lordship's in *Smart* v. *Prujean* (b): but if by this Sort of Reference a future testamentary Paper, which he is to leave, can have Effect, though written afterwards, or by some subsequent Act made Part of his Will, all the Security, required by the Legislature, not only as to the Form of the Will, but also as to the Sanity of the Testator at the Time, would be entirely lost. From both those Cases it is clear, that a farther Charge upon real Estate without Re-execution according to the Statute can be valid only in the Shape of Debts and Legacies. How could the Ecclesiastical Court exercise a Discretion by selecting Parts of this Book; granting Probate of some Parts; omitting others, to which the Will more particularly refers: in what Manner, and for what Purpose, these abstract Passages were selected, not appearing:

Thirdly, as to the supposed Re-publication: there is none having any Reference to this Book or any of these Codi-

(a) 2 *Ves.* jun. 228. (b) 6 *Ves.* 560.

cils:

1812-13.

WILKINSON v. ADAM.

cils: the Re-publication is only of the Will itself, as a Devise of real Estate merely; and after the Decisions, that have taken place, it cannot be maintained, that any of these Codicils are by the Effect of Re-publication made Part of this Will. The Judges of late have cautiously avoided farther breaking in upon the Statute of Frauds; as appears in the Cases, referred to in *Pigott* v. *Waller* (a).

Mr *Richards*, Mr. *Hollist*, Mr. *Leach*, Mr. *Benyon*, and Mr. *Preston*, for the infant Children, Defendants.

The Proposition, denying the Title of these Children to the real Estate, which upon the clear Intention in their Favor is admitted as to the Copyhold and personal Estates, appears singular out of a Court of Justice. The Court, deciding against them, must be satisfied, that they decide against the real Intention, and the clear Evidence, that they were acknowledged as the Testator's Children by *Ann Lewis*. Being a married Man at the Date of the Will, though not at the re-publication, he must, when making the Will, have intended natural Children; and the Court is as much bound by the Intention in Favor of illegitimate Children as legitimate, when it can be ascertained. The Question is only, whether this Will does not clearly and decisively shew, that the Testator had no other Object than his natural Children. That Object is expressed in the Will by the plainest Terms, the Children he may have by *Ann Lewis*; not having in contemplation Marriage with her: and therefore meaning the Children he then had, and probably those he might have, by her in a single State. It seems to be admitted, that if he had used the Description "natural Children by her," it would have been sufficient; and the Terms he has used are under the Circumstances equivalent. The Word "Children," which certainly,

(a) 7 Ves. 98.

 taken

1812-13. WILKINSON v. ADAM.

taken simply without Qualification, must be interpreted lawful Children, is in this Will by necessary Construction to be understood the natural Children, which he has or may have by *Ann Lewis*. The Policy of the Law does not permit a Devise to the natural Children a Person may have in future; not acknowledging such a Relation, before it actually exists: but there is no Rule, preventing an illegitimate Child from taking, who by coming into Existence has acquired a Capacity to take. The Decision in *Earle* v. *Wilson* against an illegitimate Child *in Ventre* does not apply to these, who were in Existence. That he meant to substitute *Ann Lewis* for his Wife is an impossible Construction, not only from the Presumption of a Devisor, that the Devisee will survive him, but by the express Condition, upon which she is to succeed, that she shall remain unmarried. The Word "may" does not necessarily import Futurity: as, "the Possessions, that I may "have I will give," or "In case I shall leave any Chil-"dren," though apparently future, would include Possessions, or Children, he had at that Time; but, admitting that to be an equivocal Expression, its Sense is determined by the whole Context with the additional Words, "and living "at my Decease." Considered upon the Principle of construing a Will, with reference to the Intention, there is no Doubt, that this includes all the Children by *Ann Lewis*, born or to be born, if living at his Decease: "and" being a mere unnecessary expletive; who must necessarily be natural Children; and are designated as particularly as if named; which is not necessary: the Mode of pointing them out being indifferent. This Intention is plain from other Parts of the Will: the Clause, giving Maintenance; and the anxious Provision against her Marriage, which would have withdrawn her Attention from these Children. The Name by Reputation, required by the old Authorities, does not necessarily mean a Name by Baptism.

Secondly:

1812-13.

WILKINSON
v.
ADAM.

Secondly: upon the Evidence, if it can be admitted, there is no Doubt. Upon the Question, how far a Paper unexecuted can be considered as inserted in a Will duly executed, it is not contended as to Papers to be afterwards written; as if he had mentioned a Paper, in which he should afterwards name the Devisees. but this Book is sufficiently identified to enable the Court to consider as incorporated those Parts, that were written at the Date of the Will; though the whole cannot be read. Thus the Entry as to these Children in the Book, which is proved to have been there, when the Will was made, being incorporated, those Children must be considered as if they were named in the Will. It is asserted, that the Introduction of this Book is making a Will by parol Evidence. Whatever may be the Nature of the Reference in the Will to another Instrument, it must be introduced by parol Evidence: but your Lordship has suggested a Difficulty in another Form; whether there is upon the Face of the Will a Description of this Book sufficient to satisfy the Court, that the Book produced is the Book referred to. The only two Authorities upon the Objection, so put, afford no Principle applicable to this Case: *Smart* v. *Prujean (a)* and *Doe* on the Demise of *Sibthorpe* v. *Taylor*; cited *(b)* by *Buller*, Justice, in *Habergham* v. *Vincent*; proceeding on the Ground, that it was a subsequent Codicil. The Effect of all this Evidence is, that this Book answers the Description in the Will, "Observations and Directions for the better Improvement of my Estates, and carrying on the different "Works as well as other Matters," satisfying the Rule, upon which the Paper was rejected in *Smart* v. *Prujean*, that the Reference must be to a Paper, which on Proof of its Existence will be identified by its Contents. The Ecclesiastical Court, granting Probate of this Instrument, have decided, that it is Part of the Will; which can only be by

(a) 6 *Ves.* 560. (b) 2 *Ves. jun.* 232.

 this

1812 13.

Wilkinson v. Adam.

this Reference: the Registers of the Children's Births not being in their Nature testamentary. The Evidence as to this Book proves, that it was always kept with the Will; and a Duplicate of it was also kept. There is therefore no Doubt of the Identity.

The Effect of the Re-publication, which is of every Thing contained in those eight Sheets of Paper, and every Thing referred to, is to bring the Will down to that Date; as after-purchased Lands will pass under a general Devise by the mere Effect of a subsequent Re-publication. This then must be considered as a Will of the 5th of *January*, 1808, and as speaking of the Book at that Date. The Evidence is, that at each Re-publication the Book was with the Testator, and these Entries were made by him before the Re-publication; that he kept the Original and Duplicate; carrying one with him, and leaving the other at his general Residence; and never did any Act of Re-publication without having the Book with him. This Book is therefore to be considered as incorporated in the Will at the Time of the last Re-publication; and then these Entries are decisive. The Codicil re-publishing gives Effect to the Will and every thing incorporated in it down to the Date of the Re-publication. The Cases upon this Subject were much considered in the two last: *Barnes* v. *Crowe* (a) and *Pigott* v. *Waller* (b); which have settled the Law. The Mode of Expression concerning this Book, "which I shall leave," as a future Act, affords no necessary Conclusion, that the Book was not then in Existence: that particular Expression applying, not to the Creation of the Book, but to the Act of leaving it at his Death.

Sir *Arthur Piggott*, and Mr. *Daniel*, for the Co-

(a) 4 *Bro. C. C.* 2. 1 *Ves. jun.* 486.

(b) 7 *Ves.* 98.

Heiresses

heiresses at Law, contended, that the Devise to the illegitimate Children, if it could not take Effect in their Favor, would prevent any other Person's taking under the Will; so as to let in the Claim of the Heir at Law, and also, that the Difference between the Terms of Thirty-one and Twenty-one Years was an Interest in real Estate undisposed of: but, the *Lord Chancellor* having upon the first Argument expressed his Opinion against these Claims, they were not pressed in the second.

Sir *Samuel Romilly*, in Reply.

The Rule of Law cannot be disputed; that the Word "Child" in a Will or Grant must be understood a legitimate Child; unless some additional Description proves, that an illegitimate Child was intended; which must be a necessary Conclusion certainly. The Question in these Cases is, how it is possible for an illegitimate Child to take under the general Description of "Child;" as he certainly may, if pointed out by some peculiar Quality: some personal Defect, as being blind, deaf, or dumb; or by a particular Residence; in all which Cases the individual is so distinctly marked, that no other Person can be supposed. If Lord *Coke* meant to assert, that a Grant or Devise might be made to an illegitimate Child by the Description of "Child," which is by no means probable, that has been long over-ruled, particularly in *Godfrey* v. *Davis* (*a*); where Lord *Alvanley* with great Clearness, but great Reluctance, as against the plain Intention, held that not to be the Meaning of the Passage in the First Institute (*b*); but that some Person must be shewn, who had acquired the Reputation of being the Child of that Father. The Expression "the Children which I may have," which is represented as not importing future Children only, but

(*a*) 6 *Ves.* 43. (*b*) *Co. Lit.* 3, b

1812-13.
WILKINSON
v.
ADAM.

referring also to those already born, admits either a prospective, or retrospective, Sense, or both, as it is used indefinitely, or with a definite Meaning. A Man speaking of such Estate as he "may purchase," certainly means in future: if of such as he may have purchased at the Time of his Death, he means both past and future: so saying, he will give such Information as he may have To-morrow is future: but it would be inaccurate to say, "sit down; "and I will give you such Information as I may have." The Conclusion is, that this Expression, when used indefinitely, has a future Sense; but is both retrospective and prospective, when it refers to some future, definite, Period. The Difficulty upon the Defendant's Construction from the additional Description "and living at my Decease" removing all Doubt, the Word "and" upon that Construction having no Use, compels them to reject that Word, as a mere expletive: a Measure, to which the Courts never resort, if, the Word being retained, the Sense is perfect, and, being rejected, is perfectly different: still less would they be disposed to adopt that Course for the Purpose of aiding the Claim of illegitimate Children under an ambiguous Phrase. The Clause, directing Maintenance, in case he shall leave any Child or Children by *Ann Lewis*, taking the whole together, and particularly the Conclusion, in the same Terms as before "such Child or Children, which I "*may have*," shews, that he looked to future Children.

The Answer to the Objection, from speaking of his Children by another Woman in the same Will, in which he supposes his Wife will survive him, is, that a Testator, making his Will, generally contemplates a Variety of Events. If beyond the Devise to these Children he had made no ulterior Disposition, that Argument, though not conclusive, would have more Force: but, taking into View the Probability, that he might have no Children, such as are described, and under that Impression devising over

to

to a Person, nearly connected with him in Blood, who lived with him under the Expectation, resulting from that natural Connection. can it be maintained, that he must have had in Contemplation, that all these Events would happen; and that he could not intend a conditional Devise to his Wife, if she should survive; and, if not, contemplating his Marriage with *Ann Lewis*; and devising to her Children? The Condition, that she shall continue single and unmarried, does not affect this Construction. A Provision for a Widow, while she continues single and unmarried, is not unusual; and is understood not as having never been married, but as continuing in that single State of Widowhood. That Restriction from a subsequent Marriage, so frequently imposed by old Men, with the other Circumstances of the Devise to *Ann Lewis* raise the strongest Inference of an intended Marriage with her; and the Inclination of the Courts is uniform in Favor of Legitimacy, of which *Alsop* v. *Stacy (a)* is a strong Instance; where upon that Principle, a Child being born Forty Weeks and Ten Days after the Husband's Death the Question was left to the Jury, and the Child was held legitimate.

No Instance has occurred of legitimate and illegitimate Children taking under one Description in a Will: which would overthrow the Rule, and the Principle, upon which these Cases have been decided: the Preference given to legitimate Children: strongly exemplified by supplying the Want of a Surrender of Copyhold, and giving Interest, not expressed, upon a Legacy; refusing it to illegitimate Children; not considering illegitimate Children unfavorably as Individuals; but disavowing the Knowledge of a Violation of the Law, and avoiding the difficult Inquiry upon the Fact of Legitimacy. If it is to depend upon Repu-

(a) *Palm.* 9.

tation,

1812-13.
WILKINSON
v.
ADAM.

tation, what can be more vague, more productive of Difficulty and Uncertainty? Reputed: by whom? By the World? One of these Children was but Six Weeks old, when the Will was made; incapable therefore of having gained a Reputation. There are many Instances of Children the reputed Children of more Fathers than one. In the Case of the *Berkeley* Peerage if Lord *Berkeley* had made a general Bequest to all his "illegitimate Children", those, who by the Decision of the *House of Lords* were illegitimate, could not have taken; not being so reputed; but being acknowledged as legitimate by him. *Metham* v. *The Duke of Devonshire*, it is true, is against this Argument: but the Point does not appear to have been considered: nor the Consequences, to which the Rule, as there laid down, establishing a Bequest to all "the natural Children" would reach.

Some important Observations arise upon the Facts, now disclosed. It has not been sworn either here or in the Spiritual Court, that there is no other Book, that can answer the Description in the Will, except that, which has been proved; which is the Duplicate. *Adam* swears, he found this Book with the Will; but does not say, he found no other. Probate has been granted only of those Parts of the Book, relating to the Children, not of those, relating to the Iron Works. Upon this very vague Description it is material to ascertain, that there is no other Book or Paper. A Book, that he shall leave, does not necessarily refer to a Book, already written: but it does necessarily refer to a future Act. In *Smart* v. *Prujean* the Person, with whom the Paper was left, was defined: but these Directions may be in his Account Books, in his Chest of Drawers; any where. Nothing can be more vague and indefinite: supposing these Books to be the same: though they vary in many Respects. A Passage in the Will directs his Burial to take place "in such "Manner

"Manner as is directed in the Book hereinafter referred "to:" but the Book produced contains no such Direction. The Specimen of an Epitaph cannot be the Direction as to his Funeral alluded to. This is decisive Evidence, that the Court has not before it *the* Book; that the Book referred to is some other Book; which cannot now be produced; and this shews the Danger and Uncertainty of proceeding on such Evidence: the Book produced in no Way answering the Description. What Parts of this Book he intended to be Part of his Will should be shewn clearly. It is said, the Re-publication and the Codicils make the Book Part of the Will: but the utmost Effect of the Re-publication is to make the Will speak at that Date. If therefore the Book had been more particularly described, by the binding, the Place, where it would be found, &c. and he had destroyed that Book, and placed another, answering the Description, in the same Place, that would not by the Effect of the Re-publication be Part of his Will. This Book therefore cannot have Effect as a Codicil. The particular Terms of the Re-publication, expressing Eight Sheets of Paper, exclude any Idea of a Re-publication of Codicils, generally. The Mischief with reference to the Statute of Frauds is, that there is no Security for the Sanity of the Testator at the future Time.

The Lord Chancellor during the Argument, and at its Close, made the following Observations.

Unattested Paper, clearly referred to in a Devise of real Estate, considered Part of the Will, if made previously: not if subsequent.

The Cases, as far as they have gone, have raised Doubts, even as to a Paper, antecedently existing, but clearly and undeniably referred to in a Will: but I take it to be decided,* and there is no Doubt, that a Paper, made afterwards, could never be Part of the Will; for the

Three

1812-13.
WILKINSON
v.
ADAM.

Legacies by an unattested Paper included under a Charge of Legacies on a real Estate by a Will duly attested; but the Produce of the Sale of a real Estate cannot be directly disposed of by an unattested Paper.

Three Witnesses, required by the Statute, are Witnesses to the Sanity of the Testator, and to all, that is necessary to constitute a good Will. The Consequence is, that the subsequent Paper has not the Ceremonies, necessary to constitute a Devise of Land. The Cases upon a Charge of Legacies by a Will with Three Witnesses apply to this; and though it is settled, that Legacies, given by an unattested Paper, will be included in that Charge, that has been met at least with this Symptom of Disapprobation, that it is remarked as a solitary Case; and if by a Will duly attested the Devisor directs an Estate to be sold, though he could have exhausted that Fund by Legacies, he could not by a Will unattested give away any Part of it.

I know no Law against devising to the Children of a Woman, whether natural, or not; as that creates no Uncertainty. The Difficulty arises upon a Devise to the Children of a particular Man by a Woman, to whom he is not married. This Testator upon the same 26th of *March*, 1807, on which he re-published the Will, makes one of these Entries in the Book; and clearly after the Re-publication; which is expressly recited; and he proceeds by this Paper to say, that Children, though not born within Six Months after his Death, shall take, if born within the longest Period allowed for Gestation; and that is explained in such a Way, that the Devisees would take, whether his natural Children, or not; as he there describes them only as her Children. Is it possible then by an unattested Paper, made on the same Day, but after a Re-publication of his Will duly attested, to vary in Two Respects so material the Description of his Devisees; introducing as Devisees of real Estate Children, born more than Six Months after his Decease; and, though by the Will it was necessary to shew, that they were his reputed natural Children, this Codicil making it necessary only to shew, that they were her's?

I do

I do not see, how I can take one Part of this Book as forming his Will less than another; unless the Manner of the Description necessarily leads me to select some Parts, and reject others; and then what am I to select, and what reject? The Spiritual Court must either take the Whole, or select those Parts, which fall under the true Meaning of the Description in the Will "Directions and Observa-"tions for the better Improvement of my Estates and "carrying on the different Works as well as other "Matters;" and, if the Whole is taken, how is it possible to execute such a Will? Many of these Directions are dated before the Will; many with only one Witness: several are left standing without Remark: others crossed out; and the Reason stated, that he had made a Will of the Date 1806. How is it possible to say, that what is not crossed out is not a Part of the Will? If I am to take this Book as a Will, disposing of real Estate, I must be informed, what Parts of it form the Will, of which I am to declare the Trusts.

Some Points of this Case admit no Doubt. It is impossible to make out the Two Points, contended for the Heir: first, that the Will means illegitimate Children; who, though incapable themselves of taking, would prevent the Plaintiff from taking; and so give Title to the Heir. That cannot be maintained; as, if illegitimate Children are meant, there is no Rule of Policy, which prevents the Court from saying, that they are intended: in other Words, if they are sufficiently described, there is no Rule, that prevents their taking: but, if they are not sufficiently described, but legitimate Children are the Persons to take, then, as there are no legitimate Children, there is no prior Taker described before the Plaintiff. There is no Doubt therefore, that the Existence of those Children, if they cannot take, does not form a Bar to the Plaintiff's taking.

The

1812-13.
Wilkinson
v.
Adam.

The next Point, contended for the Heir, arises upon the Codicil, reducing the Term of Thirty-one Years, created by the Will, to Twenty-one Years; that the Difference is an Interest in real Estate undisposed of: but this is merely a Substitution of one Term for the other; the Effect is precisely the same as if a Term of Twenty-one Years had been originally created; and there is no Interest undisposed of.

The following written Opinion was sent by Baron *Thompson* and the Justices *Le Blanc* and *Gibbs* to the *Lord Chancellor.*

The Question, to which our present Opinion will be confined, is, whether the Three natural Children of *John Wilkinson* by *Ann Lewis,* born before the making of his Will of *November,* 29th, 1806, are entitled to take his real Estate by force of that Will alone.

The Facts, out of which this Question arises, are these. Mr. *Wilkinson,* being seised of a very considerable real Estate, and possessed of personal Property to a very large Amount, on the 29th *November,* 1806, made his Will, duly executed and attested for passing real Estates. At this Time he had a Wife *Mary Wilkinson* still living, but no Children by her. A Woman of the Name of *Ann Lewis* was living with him; by whom he had Three natural Children: *Mary Ann,* born *July* 7th, 1802; *Jonina,* born *August* 6th, 1805; and *John,* born *October* 8th, 1806. All these Children at the Time, when the Testator made his Will, had acquired the Character and Reputation of being his natural Children by *Ann Lewis.* The Testator's Wife *Mary Wilkinson* died in *December,* 1806. Subsequent to her Death the Testator re-published his Will in the Presence of Three Witnesses. On the 14th of *July,* 1808,

1808, the Testator died; leaving the said *Ann Lewis* and his said Three natural Children by her surviving him.

From the material Parts of this Will, as they bear upon the present Question, we think, it most certainly appears, that the Testator meant the above-mentioned Devise to operate in favor of his illegitimate Children, born and to be born, by *Ann Lewis*; and that he had illegitimate Children only in his Contemplation.

The Manner, in which he describes the Children themselves, and *Ann Lewis*, their Mother, as living with him, whilst his Wife was then alive, the Mode, in which he appoints her Guardian of such Children, the limiting her Annuity and her Compensation for the Guardianship to the Time of her continuing single and unmarried, together with many other Passages in the Will, appear to us to place this Intention beyond all possible Doubt.

It has been said, that the Testator might, when he made his Will, have looked to the Possibility of his Wife's dying before him, of his marrying *Ann Lewis*, and of his having Children by her; and that such Children may have been the Objects of his intended Bounty under the above Bequest: but it is impossible for any Man, looking through the whole of this Will, to suppose, that he entertained any such Intention; or that he had any such Objects in view; and it is observable, that he has evidently contemplated a State of Things, in which the Event of his Marriage with *Ann Lewis* would have been impossible; and yet his Children by her are still to take; for he has bequeathed his Mansion House at *Castle Head*, and certain other Parts of his Property, to his Wife for her Life, and after her Decease to *Ann Lewis* for her Life, and after the Decease of both to his Children by *Ann Lewis*. Now, supposing these several Bequests to take place in the Order, in which

1812-13.
WILKINSON
v.
ADAM.

they stand, the Wife of the Testator must have survived him; and his Children by *Ann Lewis* must consequently have been illegitimate. We think therefore, that his illegitimate Children, born and to be born, of *Ann Lewis* were the intended, and probably the sole intended, Objects of his Bounty. We also think, that, if he had any illegitimate Children by her, after his Will was made, such future Children could not have taken for the Reason, which is to be found in all the Authorities upon this Subject; that an illegitimate Child can only take by his reputed Name of Child; and that, until he is born, he cannot acquire that Name by Reputation.

But with respect to the Three Children, who were born before the making of the Will, the Depositions prove most abundantly, that they had then acquired the Reputation of being the Children of the Testator by *Ann Lewis*; and thinking for the Reasons above given, that they were the intended Objects of the Testator's Bounty, we think, that they are intended to take the real Estate under the Will itself without the Aid or Explanation of any other Papers.

It has been argued, though not much pressed, that this Devise applies only to future illegitimate Children; and is therefore void: but, looking to the different Parts of the Will, we think, it clearly appears, (if that were necessary) that the Testator had in his actual Contemplation the illegitimate Children, who were then born, as well as those, whom he might afterwards have by *Ann Lewis*. It was also urged, that, as the Testator re-published his Will after the Death of his Wife, and when the Event of his marrying *Ann Lewis* was thereby brought within his own Power, it is fairly to be presumed, that under the Description of his Children by *Ann Lewis* he meant such Children as he might have by her if he should afterwards marry her: but we think, that in the Construction of this Devise the Intention

tention of the Testator is to be collected from the State of Things at the Time, when he made his Will, not when he re-published it; and we also think, that, if the Alteration, which took place in the Interval between the making and re-publishing his Will, were taken into the Account, enough would still remain to shew, that his illegitimate Children by *Ann Lewis* were the Objects, whom he had in view.

It was also contended, and this appears to have been the main Stress of the Argument, that, admitting the Intention of the Testator to be clear in favor of his illegitimate Children by *Ann Lewis*, that illegitimate Children, born before the Will, are included, and that the Claimants had acquired the Name and Reputation of being the Children of the Testator by *Ann Lewis*, still by the settled and established Rules of Law they cannot take under the general Description of Children in this Bequest; and a Passage in *Coke, Litt. 3. b.* was cited, and much commented upon, as supporting this Doctrine. It is there said, that "a Bastard having gotten a Name by Reputation may "purchase by his reputed or known Name to him and his "Heirs; although he can have no Heir but of his Body. "A man makes a Lease to *B.* for Life, Remainder to the "eldest Issue Male of *B.* and the Heirs Males of his "Body. *B.* hath Issue a Bastard Son. He shall not take "the Remainder; because in Law he is not his Issue; for "*Qui ex damnato Coitu nascuntur inter Liberos non computentur*; and, as *Littleton* saith, a Bastard is *quasi nullius* "*Filius*, and can have no Name of Reputation as soon "as he is born. So it is, if a Man make a Lease for "Life to *B.* the Remainder to the eldest Issue Male of "*B.* to be begotten on the Body of *Jane S.* whether the "same Issue be legitimate or illegitimate. *B.* hath Issue "a Bastard on the Body of *Jane S.* This Son or Issue "shall not take the Remainder; for (as it hath been said)

 "by

1812-13.

WILKINSON v. ADAM.

" by the Name of Issue, if there had been no other Words, " he could not take; and (as it hath been also said) a " Bastard cannot take but after he hath gained a Name by " Reputation, that he is the Son of *B.* &c.; and therefore " he can take no Remainder, limited before he be born: " but after he be born, and that he hath gained by Time a " Reputation to be known by the Name of a Son, then a " Remainder, limited to him by the Name of the Son of " his reputed Father, is good. But, if he cannot take the " Remainder by the Name of Issue at the Time, when he " is born, he shall never take it."

Illegitimate Child cannot take by the Description of Child of his reputed Father, until he has acquired the Reputation of being such Child.

We collect from this Passage, that an illegitimate Child cannot take by the Description of Child of his reputed Father, until he has acquired the Reputation of being such Child: but that after he has acquired the Reputation of being such Child he may take by that Description. So Lord *Macclesfield* appears to have understood it in the Case of *Metham* v. *The Duke of Devon (a),* hereafter referred to; and the *Master of the Rolls* in the Case of *Earle* v. *Wilson (b)* recognizes this as the Doctrine adopted and acted upon by Lord *Macclesfield* in the above mentioned Case of *Metham* v. *The Duke of Devon.*

It was admitted in Argument by one of the Counsel, who opposed the Claim of the Children, that, taking the Intention to be clear in favor of illegitimate Children, if the Devise had been to the Testator's Three Children by *Ann Lewis,* it would have been a sufficient Designation of them: but he insisted, that illegitimate Children could never take under the general Description of Children, as a Class; and he pointed out several Inconveniences, which he supposed would arise out of an Enquiry into the Fact, whether the several Claimants were or were not the Children of the Testator.

(a) 1 *P. Will.* 529. (b) 17 *Ves.* 528.

But

1812-13.

WILKINSON
v.
ADAM.

But it appears to us, that the Enquiry must be the same in Substance, whether the Bequest were to the Testator's Three illegitimate Children by *Ann Lewis*, or to his illegitimate Children, generally, by her; that in the latter, as well as the former, Case the Enquiry would not be into the Fact, but into the Reputation of their being such; and that the Inconveniences pointed out could never arise; because it is not the Fact of the Relationship, but the Reputation of it, which is to be enquired into in both Cases.

In the former Case we should have to enquire, whether each of the Persons, who presented himself as one of the Three Children, designated by the Will, had, or had not, at the Time of the Will acquired the Reputation of being such Child: in the latter the Nature of the Enquiry would be precisely the same; though it might be directed to a different Number of Objects.

The Case of *Godfrey* v. *Davis* (a) was cited as an Authority against the Claim of the illegitimate Children in the present Case. That was a Bequest in Remainder to the eldest Child Male or Female of *William Harwood;* and the *Master of the Rolls* held, that an illegitimate Child of *William Harwood* could not take; although it was known to the Testator at the Time of making his Will, that *William Harwood* had only illegitimate Children: but there *William Harwood* was a single Man: the Event of his marrying and having legitimate Children might fairly be looked to; and there was nothing apparent upon the Face of the Will, or to be collected from the State of *William Harwood*'s Family, which shewed, that the Testator meant by the Word "Child" to describe an illegitimate Child. In the present Case, we think, the

(a) 6 *Ves.* 43.

1812-13.
WILKINSON
v.
ADAM.

Will itself points clearly and manifestly at illegitimate Children.

It has also been urged against this Construction of the Devise in favour of the illegitimate Children, that, whatever the Intention of the Testator might be, it was at least a possible Event, that the Testator might survive his Wife, and marry *Ann Lewis*, and have Children by her; in which Event those legitimate Children would answer the Description of the Testator's Children by *Ann Lewis*; and must necessarily take under the Will; and that it is an established and inflexible Rule of Law, that legitimate and illegitimate Children cannot take together under the general Description of Children. We will take the former Part of this Proposition to be true; and we think, it is so. It was possible, that the Testator might outlive his Wife, and marry *Ann Lewis*, and have legitimate Children by her: the Words of the Devise are large enough to include such Children; and there appears no express Intention to exclude them: though probably the Testator had them not in Contemplation. We incline to think, therefore, that such Children would take under the Devise: but the Conclusion, drawn from thence, that under the Circumstances of this Case the illegitimate Children cannot take with them, is not, as we think, well founded. We think, that the illegitimate Children take, because they were clearly meant; and that if legitimate Children of the Description above mentioned would also take, it is because the Words are large enough to reach them; and the Testator expressed no Intention to exclude them; though he did not contemplate their Existence. When born they would answer the Description of his Children by *Ann Lewis*; and being born in Marriage, though after the Will, the Devise would as to them be free from all legal Objection.

It

1812-13.
WILKINSON v. ADAM.

It is said, that this Doctrine is opposed by the Authority of several Decisions; and the Cases of *Cartwright* v. *Vawdry (a)*, and *Kenebel* v. *Scrafton (b)*, are cited, and relied on, for this Purpose. In the Case of *Cartwright* v. *Vawdry* the Testator gives his real and personal Estates to his Executors, in Trust to apply a reasonable Part of the Produce in the Maintenance, &c. of all and every such Child or Children as he might happen to have at his Death, equally Share and Share alike, until such *(c)* of them should attain Twenty-one or Marriage; then to pay such of them as became of Age or married One-fourth of the whole Income. The Testator had one Daughter, *Mary*, who was always treated as, and supposed to be, legitimate; but was actually born before Marriage, and Three younger legitimate Daughters. *Mary* filed a Bill for her Share as a Child. The others were desirous, that she should share: but Two were under Age. It was contended, that the Division into Fourths by the Testator shewed clearly, that he meant to include *Mary*, as a Child: but the Chancellor (Lord *Loughborough*) says, "It is impossible in a Court "of Justice to hold, that an illegitimate Child can take "equally with lawful Children upon a Devise to Children;" and he proposes, that, as all were desirous of giving *Mary* her Share, the Cause should stand over, until the youngest Daughter should attain Twenty-one; which was ordered accordingly; and the Case does not appear to have been again heard of in Court. It cannot therefore be considered as a Decision. Lord *Loughborough* may have thought, that the Intent of the Testator to include his illegitimate Daughter was not sufficiently manifest; and the Doctrine, laid down by him, may be considered as applicable to those Cases only, in which the Word "Chil-"dren" is used generally, without a clear Intent; as we

(a) 5 *Ves*. 530.
(b) 2 *East*. 530.
(c) This is probably a Misprint for "each."

1812-13.
WILKINSON
v.
ADAM.

think, there appears here on the Part of the Testator to include illegitimate Children. We do not therefore think, that it bears with any Weight upon the present Case.

In regard to *Kenebel* v. *Scrafton* the Testator *James Bradshaw*, having devised all his real and personal Estate to a Trustee, declared the Uses thereof in the following Words: "I give all my personal Estate whatsoever and wheresoever, "&c. to my dearly beloved *Mary Ann Simpson* one of the "Daughters of *J. Simpson*, &c. for her sole Use and Benefit "for ever; and I will that out of the Rents, &c. of my said "Estates my said Trustee shall pay unto the said *M. A.* "*Simpson* an Annuity of £150 for her Life; and in "case I shall have any Child or Children by her who shall "be living at my Decease then I order," &c.; and he proceeds to make a Provision for such Children. The Will bore Date the 28th of *January*, 1795; and the Testator had one Male Child by *Mary Ann Simpson* then living. This Child died on the 9th of *June*, 1795; and on the 29th of *August* in the same Year the Testator intermarried with the said *Mary Ann Simpson*; and had Three Children by her; Two of whom were the Defendants in the Cause, the other having died. The Question was, whether the Marriage of the Testator and the Birth of these Children after the Date of the Will operated as an implied Revocation of it; and the Court of *King's Bench* were of the Opinion, that they did not so operate; holding, that those Children might take under the Will.

Perhaps it might have been well decided upon the Facts of that Case, that it did not sufficiently appear, that the Testator intended to include illegitimate Children in the Devise; inasmuch as both he and *Mary Ann Simpson* were single at the Time, when he made his Will; and there was no Impediment to their marrying, and having legitimate Children; who might be the intended Objects of his

Bounty.

Bounty. From the Language of the Judgment however it certainly seems, that the Court thought, that the Testator meant to provide for Children of a different Character and Denomination from legitimate; and yet they determine, that legitimate Children may take under the Bequest. In every View of the Case we think that they might; because the Terms of the Devise were large enough to comprehend them: but nothing is said in that Judgment, from which we can collect, that where a Devise evidently points at illegitimate Children, and where legitimate Children are admitted under it, because the Words are large enough to reach them, the illegitimate Children cannot take together with the legitimate: nor that even in the Case then before the Court, if the illegitimate Child had been living, he would not have been permitted to take with the legitimate Children.

But if it is an established and inflexible Rule, that legitimate and illegitimate Children can in no Case take together under the Description of Children, we should rather be disposed to say in the present Case, that legitimate Children could not take, notwithstanding the generality of the Words, than that illegitimate Children should be excluded to the Disappointment of the clear and manifest Intention of the Testator. It is observable, that in the present Case, there are no legitimate Children to contend with the illegitimate: but we have reasoned it on the Supposition, that there were both; as much of the Argument was founded on the Possibility of that Event.

We have stated the Grounds, upon which independent of any Authority to the direct Point our Opinion in Favor of the Children is founded; and the Manner, in which it appears to us, that the Arguments and Authorities, urged against the Claim of these Children, may be answered: but there is one Authority directly to the Point, that illegitimate

1812-13. WILKINSON v. ADAM.

gitimate Children, born, and reputed as such, before the Will, may take as a Class under the general Description of Children. We allude to the Case of *Metham* against the Duke of *Devon (a)*.

That Case arose upon a Devise of £3000 by the late Earl of *Devon* to all the natural Children of his Son the late Duke of *Devon* by Mrs. *Heneage*; and the Question was, whether the natural Children of Mrs. *Heneage*, born after the Will, should take a Share of the £3000. No Question was made but that the Children, born before the Will, might legally take; and the Chancellor (Lord *Macclesfield)* in stating the Objection to the Claim of Children, born after the Will, clearly explains the Ground, upon which he thought the Children, born before the Will, might take under that Bequest.

He says, that Bastards cannot take, until they have gained a Name by Reputation; and again afterwards, that a Bastard could not take, until he had a Reputation of being such a one's Child; and that Reputation could not be gained, before the Child was born. It is evident therefore, that under the Description of all the natural Children of his Son by Mrs. *Heneage*, the *Lord Chancellor* thought, that all, who had acquired the Reputation of being such Children, before the Will was made, might legally take; and consequently that the Enquiry must be, not who were in point of Fact such Children, but who had acquired the Reputation of being so.

For these Reasons we think, that the Three Children of the Testator *John Wilkinson* by *Ann Lewis*, who had acquired the Reputation of being such Children before the

(a) 1 *P. Will.* 529.

Date

Date of his Will, are entitled to his real Estates under the Will alone, without the Aid of any other Papers. 1812-13.

WILKINSON v. ADAM.

A. THOMPSON,
S. LE BLANC,
V. GIBBS.

The Lord CHANCELLOR.

1813, *Feb.* 10.

I have been favoured with the Opinion of the Three Judges on the second Point; how far this Book is to be considered as describing the Individuals, who are to take under the Will. The Judges state their Opinion in the following Terms:

"Upon this Point, as it regards the real Estate, we "agree in thinking, the Testator does not refer to the "Book, as containing the Description of the Persons to "take under the Will; and it cannot be resorted to as Part "of his Will for the Purpose of ascertaining them."

This is expressed in very cautious and particular Terms; from which I understand, they do not go the Length of saying, that no Part of the Book can be considered as Part of the Will, I believe, they intended that: but it may mean, that, attending to the particular Manner, in which the Testator in that Book refers to Subjects, as to which he gives Directions, the Reference is not to that Part of the Book; or that it does not make it Part of the Will. I collect however their Opinion, that it must be by Force of the Will itself, that these natural Children are to take; and that they cannot have the Benefit of the Contents of this Book as a Description of them.

As this is a Case, furnishing Questions, not only of considerable

1812-13.
WILKINSON v. ADAM.

siderable Importance, but of Difficulty, and which probably may go to the *House of Lords*, I should not think it right to state merely my Opinion upon the Two Points without the Reasons; and before the Conclusion of the Cause I shall have an Opportunity of conversing with the Judges, and understanding precisely the Grounds, on which they proceeded.

1813, *March* 1.

The Lord CHANCELLOR.

This is a Case, in which, the Testator being a married Man at the Date of his Will, his Wife then living, and having no legitimate Children, it is proved as a Fact, that he had Three infant Children, born of a Woman, named *Ann Lewis*; which Three Children, it appears proved, had gained the Reputation of being his natural Children. After the Execution of his Will he appears to have frequently re-published it: but it is only material to notice, that he did re-publish it, after he had in a Book expressly stated by a Paper, not attested by Three Witnesses, who were the Individuals he meant by the Description of certain Devisees in his Will. He re-published the Will by a Codicil, duly attested, of a Date subsequent to that Description; and one Question, that was made, is, whether that Book is to be taken to be Part of the Will as to the real Estate.

The Two concluding Clauses of the Will, which must be taken as speaking from the Moment of the last Re-publication, have Reference to the Book, which has been produced; and it was particularly pointed out by Mr. *Preston*, that in one of these Codicils, proved in the Ecclesiastical Court, the Testator takes Notice of the Place, where he wishes to be buried. Upon this Question the Judges have certified

1812-13.

WILKINSON v. ADAM.

certified their Opinion, that this Book cannot be resorted to for the Purpose of explaining, who are the Persons, intended to take; and I take them to have expressed their Opinion so, in order to avoid concluding the Question, whether that Book might be resorted to as Evidence of the Reputation, to fix the Character of Children upon these Three Devisees. I say nothing at present upon that Question; as I remain of the Opinion I expressed; that I find no Authority to justify me in holding, that this Book with reference to the Devisees can be taken as Part of the Will as to the real Estate. It is not necessary to examine, how far all the *Dicta* to be found, where a Will, attested by Three Witnesses, refers to an antecedent Paper, can be supported: but there was no Period of this Testator's Life, in which it could be asserted, that, if he had died at that Moment, any Book whatsoever would have formed Part of his Will. The Book was ambulatory to the last Moment of his Existence; and it is impossible upon the Principle of the Case of *Smart* v. *Prujean (a)* to maintain, that this Book was Part of the Will as to the real Estate. If it could have been so considered, it would not have been necessary to consider the other Question upon the Will; as those Papers would have given a distinct Description of the Persons intended: but, if they are not to be taken as Part of the Will, it is necessary to consider the Testator's Meaning, as it is to be collected agreeably to the Rule of Law upon the Will itself.

This is, as I have observed, the Will of a Man, married, his Wife living at the Time, having no legitimate Children; but Three Infants sufficiently proved to be at that Time his reputed Children by *Ann Lewis*. The Question is, whether those Three Children, who had gained the Reputation of being the Children of this Testator previously to

(a) 6 *Ves.* 560.

the

1812-13. WILKINSON v. ADAM.

the Will, can take the Property, devised by these Words; being illegitimate; or whether the Construction is not to be such Children as he might have by *Ann Lewis* legally; in case his Wife should die; and he should marry *Ann Lewis,* and have legitimate Children by her.

"Child," &c. *primâ facie* means legitimate.

The Rule cannot be stated too broadly, that the Description, "Child, Son, Issue," every Word of that Species, must be taken *primâ facie* to mean legitimate Child, Son, or Issue: but the true Question here is, whether it appears by what we call sufficient Description, or necessary Implication, that the Testator did mean these illegitimate Children; and, to view the Case as accurately as is necessary for the Purpose of a Determination of that Question, we must consider, what would have been the Effect, not only with reference to Children who had at the Time of making the Will gained the Reputation and Character of being his Children, but also as to future illegitimate Children; who, though not to be considered as his Children at the Moment of their Birth, might have acquired that Character before his Death; and we must see, what would have been the Effect; if it had happened, that, surviving his Wife, he had married *Ann Lewis*; and had legitimate Children by her. The Case has been very ably argued upon the View of all these Events.

In all the Cases, that I have seen, having Relation to this Question, the illegitimate Children, if they were to take, must have taken, not by any Demonstration, arising out of the Will itself, but by the Effect of Evidence *dehors*, read, or attempted to be read, with a View to establish, not out of the Contents of the Will, but by something extrinsic, who were intended to be the Devisees; and if my Judgment upon this Case is supposed to rest upon any Evidence out of the Will, except that, which establishes the Fact, that there were Individuals, who

had

had gained by Reputation the Name and Character of his Children, that Conclusion is drawn without sufficient Attention to the Grounds, on which the Judgment is formed: my Opinion being, that, taking the Fact as established, that there were Children, who had gained the Reputation of being his Children, it does necessarily appear on the Will itself, that he intended those Children. If that Principle is just, and this Case falls within its Reach, all the Cases cited are inapplicable to this.

In the Case of *Godfrey* v. *Davis* (a), whatever was proved in the Cause, nothing resulted from the Will itself, shewing, that the Testator knew those Circumstances, which were reasoned upon. There is no Doubt, that Child might have been *Persona designata*: but the Question was, where the Will furnished nothing but the general Description " the Child of *William Harwood*," those Terms were a sufficient Indication of that Intention. The Question then, consistently with that Case, will be, what is necessary in a Will, describing the Devisee under the general Term " Child," to enable the Court to say, there is sufficient in that Will particularly to point out, and manifestly and incontrovertibly to shew, that the Testator intended a natural Child; taking the whole Description together. With that Decision I perfectly agree: my Opinion being, that there is not enough in that Will to shew, that the natural Child was the *Persona designata*. *Harwood* was a single Man; who might marry; and might have legitimate Children: but the Question in this Case is as to a Man, married at the Time of making the Will; and stating incontrovertibly, that he thought his Wife would survive him. What could he mean by describing these as his Children: the Children of a Person, who, it is plain, supposed, he should die, before he could get rid of the Connection he had by Marriage with another Woman.

(a) 6 *Ves.* 43.

The

The Case of *Cartwright* v. *Vawdry* (a) also appears to me to be rightly decided: by the Language of the Will in that Case the Testator appears to have had in Contemplation, that there might be more, or fewer, Children at her Death than there were, when he made his Will: which is very material to this Case. Though, it is true, there were Three legitimate Children, and One illegitimate, the Circumstances of the Direction to apply the Income in Fourths can only afford a Conjecture; as, if between the Time of his Will and his Death One or Two of these Children had died, the Division in Fourths would have been just as inapplicable, as it was in the Case, that happened. The Question therefore only comes to this; whether the single Circumstance of his directing the Maintenance in Fourths compelled the Court to hold by necessary Implication, that the illegitimate Child was to take by Implication with the others, as much as if she had been in the clearest and plainest Terms *Persona designata*; and my Opinion is, that this Circumstance is by no Means sufficient. That Testator, it is clear, had made a Will, which, though his Death followed so quick, would have operated in Favor of all his Children, however numerous they might have been; and in favor of subsequent legitimate Children, even if every legitimate Child he had before had died. It was therefore impossible to say, he necessarily means the illegitimate Child; as it is not possible to say, he meant those legitimate Children. That Will would have provided for Children, living at the Time of his Death, though not at the Date of his Will. It could not be taken to describe Two Classes of Children, both legitimate and illegitimate. Without extrinsic Evidence it was impossible upon the Will itself to raise the Question. The Will itself furnished no Question, whether legitimate or illegitimate Children were intended: but the Question, upon which the Court was to decide, was furnished by Matter, arising out of, not in, the Will.

(a) 5 *Ves.* 530.

The

The Case of *Kenebel* v. *Scrafton* (a) had for a considerable Time very great Weight with me upon this Question. The Point, immediately before the Court, was, whether the Will of that Testator, who was an unmarried Man, was revoked by his Marriage and the subsequent Birth of Children. The Opinion of the Court, consistently with former Authorities was, that, as Marriage alone will not revoke a Will, though, connected with the Birth of a Child, it will, yet those Two Circumstances would not have that Effect; the Will containing a Provision for Children, if the Testator should have any.

Marriage alone not a Revocation of a Will; as with the birth of a Child it is. Exception, where the Will provides for Children.

Upon what can be collected from what was said by the Court and from the Argument, there was nothing upon the Face of that Will, raising a necessary Implication, that legitimate Children were not to take; or that legitimate and illegitimate Children could not take together, as it has been argued here, under the same Description. It would be very difficult to make out, that they can so take: but that was not a Difficulty, with which the Court had to contend in that Case. If the Court had thought, that those Words meant illegitimate Children, the necessary Effect of the subsequent Birth of Children would have been, that the Will would have been revoked. We may conjecture, that he meant illegitimate Children, if he did not marry; yet notwithstanding that may be conjectured, the Opinion of the Court was, as mine is, that, where an unmarried Man, describing an unmarried Woman as dearly beloved by him, does no more than making a Provision for her and Children, he must be considered as intending legitimate Children; as there is not enough upon the Will itself to shew, that he meant illegitimate Children; and my Opinion is, that such Intention must appear by necessary Implication upon the Will itself.

(a) 2 *East.* 530.

1812-13.
WILKINSON
v.
ADAM.

Implication. Necessary Implication imports, not natural Necessity, but so strong Probability, that an Intention to the contrary cannot be supposed.

Bastard may take by Purchase, if sufficiently described; and having acquired the Reputation of the Child of that Person.

With regard to that Expression "necessary Implication," I will repeat what I have before stated from a Note of Lord *Hardwicke's* Judgment in *Coriton* v. *Hellier*; that in construing a Will Conjecture must not be taken for Implication: but necessary Implication means, not natural Necessity, but so strong a Probability of Intention, that an Intention contrary to that, which is imputed to the Testator, cannot be supposed.

I do not notice *Earle* v. *Wilson* (a) and all the other Cases; as they only go to this; that the Description of Son, Child, &c. means *primâ facie* legitimate Son, &c.; and all the Cases, from the Passage in Lord *Coke* (b), establishing, that a Bastard may take by Purchase, if sufficiently described, amount to no more than he must make that out upon the Will itself.

It was stated with great Force, that a Decision in favor of these Children would introduce Evidence, which no Court ought to endure; that the Mother must be called, for the Purpose of enquiring from her, whether the illegitimate Children were begotten by the Testator, or by other Persons. That is not so. All the Cases, which negative the Possibility of a natural Child taking under the general Description of "the Child, of which *A.* "is *ensient* by me," &c. are Authorities, that this is not the Species of Evidence, by which the Court enquires, who are meant: but the Evidence of that is, that *A.* has acquired the Name and Character of Son, or Child, by Reputation; and, whatever Disappointment it may be supposed a Testator would feel, if, having had no Concern with the Creation of that Child he could see what was going on, yet, that Child, if it had obtained the Reputation of being his Child, would take under that Description; though if he had been aware of the real Fact, he would

(a) 17 *Ves.* 528. (b) *Co. Lit.* 3. b.

have

have prevented that by an Alteration of his Will: but the true Question is, had the Child acquired a Name and Character, that entitled the Court to say, that Child is the Person to take?

It was stated, very ably, that this might have done, if the Description had been by a Nick-name, a bodily Infirmity, the Place of Birth, or Residence, of the Child; and it seems to be admitted, that, if the Testator had spoken of his Three Children by *Ann Lewis*, that would have done: but it is said, they cannot be described as a Class. If that Description would have done, the Ground must be, that the Evidence establishes, who are to take by Reputation: not as Evidence of the Fact. If you are to enquire, who was the Father of the Children, you must do so in the same Manner, when he does not state their Number: but in that Case also, if it can be proved, that there are Three Children, who had acquired the Reputation of being his Children, they would take; and, if he had mentioned Three Children, and only Two could be found, who had the Reputation of being his, those Two only would take; though Three were mentioned; not being expressly named in his Will.

It was strongly urged farther, that though he might give to Three Children by a Description, amounting to *designatio Personarum*, he could not give to natural Children, as a Class; supposing he had used those Words, instead of any equivalent Expression. Upon that Question, whether he could give to natural Children, as a Class, whatever might have been my Opinion, if this were *res integra*, the Case of *Metham* v. *The Duke of Devon* (a), which has determined, that a Testator may give to natural Children, as a Class, has never been disturbed; and if it is to be now disturbed, this is not the Place for that.

(a) 1 *P. Will.* 529.

1812-13.
WILKINSON v. ADAM.

It is farther contended however, that, if natural Children, then born, may take as a Class, future natural Children cannot. It is quite unnecessary now to decide that Question. Here are no after-born Children; and, with regard to the Expression "which I may have", though obviously future, yet upon the whole it is clear, that by those Words the Testator meant to describe Persons then, at the Date of the Will, in Existence. Whether the Cases cited from Lord *Coke (a)*, which are all Cases of Deeds, have necessarily established, that no future illegitimate Child can take under any Description in a Will, whether that is to be taken as the Law, it is not necessary to decide in this Case. I will leave that Point, where I find it, without any Determination. It was farther argued with great Force, that, if this Testator had lived until the Death of his Wife, as he did, and had afterwards married *Ann Lewis*, and had legitimate Children by her, those Children must have taken; and legitimate and illegitimate Children cannot both take under the same Description; and it would be very difficult to persuade me, that they can: but, if my Opinion is right, that upon the Contents of this Will the Testator is proved to have intended illegitimate Children, that Question never could have arisen; as then, though the Devise is to illegitimate Children, Marriage and the Birth of legitimate Children would have the same Effect as upon a Devise to any Stranger.

The Question therefore comes round to this; whether upon the Contents of this Will it is possible to say, he could mean at the Time of making that Will any but illegitimate Children: a married Man; with a Wife, who, he thought, would survive him; providing for another Woman, to take after the Death of his Wife, and for

(a) *Co. Lit.* 3. b.

Children

Children by that Woman: it is impossible, that he could mean any Thing but illegitimate Children; and, if that Devise would have comprehended legitimate Children, that would be by an Operation of Law, that would have been an entire Surprise upon him; as he could not mean legitimate Children by this Will. If the Will itself shews that, without any other Evidence than what proves, who were reputed to be his Children, and, that being established, the Will itself shews, he meant to provide for them, so providing for them as necessarily to shew, that they are his Devisees, there is no Authority, that the Devisees, whose Character is so necessarily to be collected from the Will, are not capable of taking.

The Conclusion is, that these Three Children are upon the Will itself, the whole taken together, without looking at the Book, entitled to take as the Devisees of this Testator.

The Injunction was dissolved; and the Bill dismissed (a).

(a) Swaine v. Kennerley, post.

1813, *Feb. 7.*

SWAINE v. KENNERLEY.

Under the Description of "Children" in a Will illegitimate Children, existing at the Date of the Will, not entitled, unless proved by the Will itself to be intended; and Evidence can be received only for the Purpose of collecting, who had acquired the Reputation of Children.

An only legitimate Son therefore held entitled as Devisee.

JAMES Swaine by his Will, dated the 24th of *August*, 1796, devised his real Estates to *John Kent* and *Samuel Kennerley*, their Heirs and Assigns, upon Trust

1813.
SWAINE
v.
KENNERLEY.

by Mortgage or Sale to raise the Sum of £2100, and lay out the same in their own Names in the Purchase of Freehold Lands, &c. and settle the same to the Use of all and every the Child and Children of the Testator's late Son *Thomas Swaine* deceased equally to be divided between or amongst them, to hold as Tenants in Common and not as Joint Tenants, and to the respective Heirs of the Body or Bodies of all and every such Child and Children issuing.

The Testator's Son *Thomas Swaine* left Three Children: of whom the Plaintiff only was legitimate: the other Two *Thomas* and *John Swaine* being born before Marriage. The Bill prayed a Declaration, that the Plaintiff was entitled as Tenant in Tail in Equity to the whole £2100, &c. All the Children were living at the Date of the Will.

Mr. *Hart*, and Mr. *Roupell*, for the Plaintiffs; and Sir *Samuel Romilly*, and Mr. *Agar*, for the Defendants, declined to argue this Case; as it must depend upon the Decision of *Wilkinson* v. *Adam* (a). After that Decision this Cause was set down for Judgment.

The Lord CHANCELLOR.

Upon looking into the Papers in this Cause I am clearly of Opinion, that no Person except the legitimate Child can take under this Devise, for this Reason; that the Will itself does not prove, that the Testator meant an illegitimate Child; and according to the Opinion, expressed in *Adam* v. *Wilkinson*, I cannot go into the Circumstances of Evidence to raise a Construction. The Will must prove, that illegitimate Children are intend-

(a) *Ante*; the preceding Case.

ed;

ed; and extrinsic Evidence can be received only for the Purpose of collecting, who had acquired the Reputation of being Children of the Person, named in the Will.

The Decree was made accordingly.

ROLLS.
1813,
March 13. 15.

BULLOCK v. FLADGATE.

Effect of a private Act of Parliament, declaring an Estate vested in Trustees and their Heirs in Trust to sell, discharged from the Trusts of a Settlement; devesting the legal Fee, outstanding under a prior Settlement.

Power to appoint Estates, to be purchased with Money, produced by the Sale of other Estates, well executed by an Appointment, operating directly on the original Estates.

THE Bill was for a specific Performance of a Contract for the Sale of an Estate. The Answer, submitting to perform it, if the Plaintiff could make a good Title, stated, that by the Abstract it appeared, that by Indentures, dated the 18th and 19th of *November*, 1763, on the Marriage of *Elizabeth Lant* and *John Bullock*, Sir *John Philips* by the Direction of *Elizabeth Lant*, in whom the Estates were by a former Settlement and Will vested in Fee-simple, conveyed to *Francis Buller*, *George Elliot*, and *John St. Leger Douglas*, upon Trust after the Marriage to permit *Elizabeth Lant* during her Life to receive the Rents and Profits for her separate Use, and after her Decease, leaving Issue by *John Bullock*, to the Use of *John Bullock* for Life; with Remainder to the Use of *Buller*, *Elliot* and *Douglas*, and their Heirs, during the Life of *John Bullock*, upon Trust to preserve Contingent Remainders; with Remainder to the Use of the first and other Sons of the Marriage successively in Tail, and of the Daughters, as Tenants in Common in Tail; and for Default of such Issue to the Use of such Person or Persons, and for such Estate and Estates as *Elizabeth Lant* should notwithstanding her Coverture by any Writing under her Hand and Seal, attested by Two or more credible Witnesses,

1813.
BULLOCK
v.
FLADGATE.

nesses, or by her last Will and Testament duly executed, appoint; and, in Default of such Appointment, to the Use of *Elizabeth Lant*, her Heirs and Assigns for ever.

By a private Act of Parliament, 12 *Geo.* 3, reciting the Settlement of 1763, it was enacted, that the settled Estate should from the 1st of *July*, 1772, be vested in *John Saint Leger Douglas* and *John Cook*, their Heirs and Assigns, freed and absolutely discharged from all the Trusts, Estates, Charges, &c. in the Settlement limited, upon the Trusts following: that the Trustees should with the Consent and Approbation of *John Bullock* and *Elizabeth* his Wife in Writing make sale, dispose of, and convey, the Premises; and lay out the Money, so arising, in the Purchase of Estates in Fee-simple, to be settled to the same Uses as declared in the Settlement; and that the Persons, to whom the Trustee should sell, should hold and enjoy "freed and absolutely acquitted, exonerated, and "discharged, of and from all and every the Uses, Trusts, "Estates, Charges, Powers, Provisoes, Limitations and "Agreements, in the said hereinbefore recited Indenture "of Settlement, made on the Marriage of the said *John* "*Bullock* and *Elizabeth*, his Wife, limited, provided, "declared, or agreed, of and concerning the said Pre-"mises respectively;" and that the Receipts of the Trustees should be sufficient Discharges to the Purchasers, &c.

It was farther enacted, that until the Sale the Trustees should stand seised of the Premises, so vested in them, in Trust to permit and suffer the Rents, Issues and Profits, to be received and taken by the Person, who ought or would have been entitled to receive the same, in case that Act had not been made. The Act contained a Clause, saving to the King and all other Persons (except *John Bullock* and *Elizabeth*, his Wife, and their Issue, and the Heirs and Assigns of *Elizabeth Bullock*, and the Trustees

in

in the Marriage Settlement, their Heirs, &c. and all Persons, claiming any Use, Estate, Trust, &c. in the Property by virtue of the Settlement, and their respective Heirs, &c.) all such Estates, Rights, Titles, Interest, &c. as they had before passing the Act, or would have had, in case the same had not passed.

No Part of the Estate having been sold according to the Directions of the Act, *Elizabeth Bullock* by her Will, dated the 31st of *January*, 1780, and duly attested, devised and appointed the Premises to the Use of Sir *James Lake* and the said *John Cook*, their Heirs and Assigns, in Trust for *John Bullock* for Life, and after his Decease in Trust that *Lake* and *Cook*, or the Survivor of them, his Heirs or Assigns, should sell; and apply the Money, arising therefrom, in the first Place in Payment of several Legacies; and the Residue to and amongst all and every the Child and Children of the Plaintiffs, *Jonathan Josiah Christopher Bullock* and *Juliana Elizabeth*, his Wife, who should be living at the Death of the Testatrix's Husband, and to his, her, and their, Executors and Administrators equally, &c.

By Indentures dated the 12th and 13th of *May*, 1780, *Bullock* and his Wife conveyed the Estates to Sir *James Lake* and his Heirs, to the Use of *John Bullock* for Life; with Remainder to the Use of *Douglas* and *Cook* and their Heirs, during the Life of *John Bullock*, upon Trust to preserve Contingent Remainders; with Remainders to the Use of *Elizabeth Bullock* for Life, and the first and other Sons successively in Tail, and the Daughters, as Tenants in Common in Tail; Remainder to the Use of such Persons, and for such Estates, as *Elizabeth Bullock* whether *covert* or *sole*, by Deed or Writing by her sealed and delivered in the Presence of and attested by Two or more Witnesses, or by her Will, or any Writing purporting

1813.
BULLOCK
v.
FLADGATE.

ing to be her Will, signed by her in the Presence of and attested by Three or more Witnesses, should direct, limit, or appoint, and, in Default thereof, to the Use of the Plaintiff *Juliana Elizabeth* the Wife of *Jonathan Josiah Christopher Bullock*, her Heirs and Assigns for ever.

Elizabeth Bullock died in 1793; never having had Issue, or made any Appointment under the Power, reserved by the Deeds of *May*, 1780; and, being illegitimate, she left no Heir.

By Indentures, dated the 13th and 14th *June*, 1800, the Plaintiffs *Jonathan Josiah Christopher Bullock* and *Juliana Elizabeth*, his Wife, conveyed to *Charles Arnold* and his Heirs; to hold, subject to the Life Estate of *John Bullock*, to the Use of Sir *James Lake* and *John Cook*, their Heirs and Assigns for ever, upon and for so many of the Trusts, Ends, Intents and Purposes, &c. by the Will of *Elizabeth Bullock* expressed, as were then existing undetermined and capable of taking Effect. Since the Execution of those Deeds *John Bullock* died.

The Answer submitted, that under the Circumstances *John Bullock* and *Elizabeth* his Wife had not, nor had either of them, ever any Power to appoint the equitable Reversion in Fee-simple of the Premises, expectant on the Determination of the precedent equitable Estates, created by the Marriage Settlement; and that the legal Estate in Fee-simple was not vested by the Act of Parliament in *Douglas* and *Cook*, or either of them; but after that Act passed remained vested in *Elizabeth Bullock;* and had escheated to the Crown; and, if *John* and *Elizabeth Bullock*, or either of them, ever had, before the Act passed, any Power to appoint, the equitable Reversion in Fee-simple, the same Power could not be exercised after the Act passed.

Sir

Sir *Samuel Romilly*, Mr. *Leach*, and Mr. *Trower*, for the Plaintiffs, contended, against the first Objection of the Purchaser, that the legal Fee, remaining in *Elizabeth Bullock*, had by her Death without Issue escheated to the Crown, that the Object of the Act of Parliament was to vest the Estate in the Trustees to sell; giving them, not such Estate as the Trustees under the Settlement had, but an absolute Estate in Fee, devested of all the Uses and Equities under the Settlement; that they might convey the absolute Fee to a Purchaser:

Secondly, to the Objection, that the Power of Appointment was not over the Estates, originally settled, but over those only, directed to be purchased with the Money, produced by the Sale, that Mrs. *Bullock* had a Right to elect, that the Sale, which was to take place only with her Consent, should not be made; according to *Pearson* v. *Lane* (a); and her Power operated equally upon the original Estates, not sold.

Mr. *Hart*, Mr. *Bell*, and Mr. *Shadwell*, for the Defendant.

Though the legal Estate was intended to be transferred to the Trustees by the Settlement of 1763, and the Conveyance was calculated to have that Effect, nothing passed but an equitable Interest: the legal Estate remaining in *Elizabeth Bullock*, in whom it was then vested, has in the Events, that have taken place, escheated to the Crown; and there is no Jurisdiction to enforce the Equities, that may subsist against Individuals. In all such Cases a private Act of Parliament is considered merely as a Form of Conveyance, removing Disabilities; but con-

(a) 17 *Ves.* 101.

strued

1813.

BULLOCK v. FLADGATE.

strued upon the same Principle as ordinary Conveyances to be controlled and regulated by the Object of the Parties, with reference to the Nature of the Subject. The sole Object was to convey the Estates, discharged of the prior Uses and Trusts; in other Words to extinguish all those Trusts and Uses. In the Construction of such an Act the Court understands the Legislature as intending no more than to transfer such Title as the Parties are stated to have had vested in them. There was no Intention to transfer any legal Estate from Mrs. *Bullock*; who, it is assumed, had not the legal Estate. The whole Effect therefore was to transfer to Trustees for Sale such Estate as the other Trustees had, discharged of all the Trusts of the Settlement. The Case of *Pearson* v. *Lane* has no Application. The Court is pressed to give to this Act of Parliament, which has totally annihilated the Power of Appointment, an Operation beyond the express Declaration of its Object; which is limited to vesting the Estates in Trustees cleared from all the Trusts of the original Settlement; leaving all other Interests, as they stood: consequently leaving in Mrs. *Bullock* the Estate in Fee, which none of the Parties contemplated as being in her. In *Westley* v. *Clarke* the Parties, who applied for the Act of Parliament, being Tenants in Tail, might have barred the Estates by their own Act: but Mr. and Mrs. *Bullock* were only Tenants for Life.

The MASTER *of the* ROLLS.

March 15.

Two Objections are made to this Title: first, that the legal Estate was not vested in the Trustees under the Act of Parliament: secondly, that the Appointment by Mrs. *Bullock* of the beneficial Interest in this Property is not a valid Appointment. By the Act the Property is settled upon

upon and vested in *Douglas* and *Cook*, their Heirs and Assigns. There is nothing imperfect or ambiguous in that Enactment: whatever Mistake there might be with regard to the Persons, in whom the legal Estate was before vested. The clear Intention of the Legislature, and of the Parties, was, that it should then be placed in these Trustees. The Clause does not take the Estate out of this, or that, particular Person; but vests it by general Words; which must have their Effect against all, and upon the Estates of all, whose Rights are not saved by the subsequent Part of the Act: consequently as against Mrs. *Bullock* and her Estate just as much as they would have had against *Douglas* and *Elliot*, if the Estate had been vested in them.

But it is said, the Effect of these Words is qualified and restrained by the added Words "freed and absolutely acquitted, exonerated, and discharged, of and from all "and every the Uses, Trusts, Estates, Charges, Powers, "Provisoes, Limitations and Agreements, in the said "hereinbefore recited Indenture of Settlement."

The Argument, as I understand it, is, that the Estate is vested in these Trustees no farther, and to no other Effect, than to free it from the Trust and Limitations of the Marriage Settlement; and Mrs. *Bullock*'s Estate in Fee not being derived under that Settlement, but having Existence independently of it, was not affected by the Act. There is however nothing restrictive or qualifying in these Words which seem rather to be added for the Purpose of Amplification, to express how large and absolute an Estate the Trustees were to take. It is declared, unnecessarily and superfluously perhaps, that the Trustees should not only have the Estate vested in them, but so vested as to be freed and discharged from the Trusts of the Marriage Settlement: the only Trusts, to which it was supposed it could be subject. That is very different from vesting it in them

1813.

Bullock v. Fladgate.

them to the Intent only of being freed, and for the single Purpose of freeing it, from those Trusts.

With regard to Mrs. *Bullock's* Power of Appointment it is clear, that it depended upon Default of Issue of the Marriage: not, as was attempted to be argued, on there being Issue living at her Death, which should afterwards fail. The only Reason for applying for the Act was the Possibility of the Existence of Issue of the Marriage. Putting them out of the Question, none having been born, there was no one but Mr. and Mrs. *Bullock*, who had any Interest in converting the Estate into Money, and with that Money purchasing other Lands. If that had been done, it is admitted, that the Estate purchased would have been subject to her Power of Appointment. I apprehend, that Equity will uphold an Appointment of the Estate itself as amounting substantially to the same thing; on which Principle it is that Appointments, deviating considerably from the letter of the Powers, under which they were made, have frequently been supported. It has been held, that a Power to appoint an Estate in Land includes a Power to dispose of the Estate, and appoint the Produce: the same Effect has been given in the more doubtful Case of a Power to charge an Estate; and a Power to appoint the Money produced by an Estate, directed to be sold, has been considered as a Power to appoint the Estate itself. During all the Litigation, in the Case of *Standen* v. *Standen (a)*, it was never doubted, that the Widow had the Power to appoint the Estate itself: the only Question was, whether her Will was a valid Execution of that Power: yet the Testator had directed the Estate to be sold; and the Letter of the Power was confined to the Produce of the Sale.

Power to appoint an Estate includes a Power to dispose of the Estate and appoint the Produce.

The same Effect has been given in the more doubtful Case of a Power to charge; and a Power to appoint the Money, produced by an Estate, directed to be sold, has been considered as a Power to appoint the Estate itself.

(a) 2 *Ves.* jun. 589.

Supposing

Supposing Mrs. *Bullock*'s first Appointment good, as I think it was, there is no Difficulty upon what afterwards took place; the Parties interested against her Appointment having by Arrangement among themselves agreed to give Effect to it.

There is no Ground therefore for either of these Objections; and the Plaintiff must have a Decree for a specific Performance.

Rolls. 1813, *March* 5. 8.

PARNELL *v.* LYON.

Condition requiring the Consent of Executors to Marriage not applied to a Daughter, married in the Testator's Life with his Consent or subsequent Approbation.

That Fact not being proved, an Inquiry was directed.

WILLIAM Barton by his Will, dated the 30th of *September*, 1800, bequeathed all his personal Estate to Trustees upon Trust to be converted into Money; and, after satisfying his Debts, &c. to be invested and the Interest applied unto and equally amongst his Son *William* and Daughters *Elizabeth*, *Mary*, and *Margaret*; One-fourth Part of the Principal to be paid unto his Son, when he should attain Twenty-one; and One-fourth Part unto each of his Daughters, when and as they should respectively attain the Age of Thirty Years; and in case any of them should die in the mean Time leaving Issue, then he directed that the Part or Share of him or her so dying should go and be divided unto and equally amongst such Issue: but if any of them should die without Issue, the Part or Share of him or her so dying should go and be divided equally amongst such of them as should be then living and the Issue of such of them as should be then dead. He farther declared his Will to be, that, if any of his Daughters should marry, before they should attain the Age of Thirty Years, with the Consent and Approbation of any Two of his Executors, or of any One of his Executors,

1813.
PARNELL
v.
LYON.

cutors, if there should be but One then living, her Fourth Part or Share of the Principal Money then out at Interest should immediately become vested in her, and be forthwith paid to her, her Executors, Administrators, or Assigns; and that if any of his Daughters should marry without the Approbation and against the Consent of Two of his Executors, or One of them, if there should be but One then living, her Fourth Part or Share of the said Principal Money and all contingent Sums should be continued out at Interest during her Life; and the Interest thereof should be yearly paid to her; but the Principal should go unto, and be equally divided amongst, such of her said Brother and Sisters as should be then living, and the Issue of such of them as should be then dead.

The Testator's Daughter *Elizabeth* married the Plaintiff *Parnell* in her Father's Life-time, in *February*, 1810: she attained Twenty-one in *July* following; and the Testator died in *August*, 1810.

The Bill alleged, that the Marriage had taken place with the Testator's Consent and Approbation, with whom his Daughter *Elizabeth* afterwards lived upon the same Terms as before her Marriage; and, submitting that immediately upon the Testator's Death she became entitled to an absolute Interest in One-fourth of the Residue of his personal Estate without waiting to attain the Age of Thirty, prayed a Declaration accordingly.

The Executors by their Answer denied, that the Marriage took place with the Consent or Approbation of the Testator; and that *Elizabeth* afterwards lived with him upon the same Terms of Affection as before her Marriage: on the contrary insisting, that the Marriage was against his Approbation, and that after the Marriage he had shewn a Disposition to prevent the Plaintiff, the Husband, from receiving

receiving the Provisions intended by the Will for *Elizabeth.*

1813. PARNELL *v.* LYON.

The Plaintiffs entered into no Proof.

Mr. *Hart*, and Mr. *Horne*, for the Plaintiffs, contended, that the Plaintiff *Elizabeth* became entitled to her Legacy absolutely the Moment of the Testator's Death; having previously attained Twenty-one; that, though the Answer attempts to throw some Doubt upon the Father's Consent, and the Terms, on which she lived with him after her Marriage, he made no Alteration of his Will; which he scarcely would have suffered to stand, had he disapproved the Connection: the Condition, therefore, was virtually complied with; and the Consent of the Executors must be construed as a Provision, to operate only in the Event, that his Daughters should not marry in his Life-time; in which the Executors were to stand *in loco Parentis.*

Mr. *Richards*, and Mr. *Bell*, for the Defendants.

The Plaintiff is not absolutely entitled; unless she lives to the Age of Thirty. Nothing can be clearer than this Clause of the Will; expressly requiring the Consent of the Executors; not providing for a Marriage with the Testator's Consent in his Life-time. The Court cannot insert Terms, which would render his Consent equivalent: but the Executors positively deny, that the Marriage took place with the Testator's Consent: and the Plaintiffs have produced no Evidence to shew that. The Event, therefore, has not happened, upon which she was to take. No Maxim is clearer, than that in the Case of a Condition precedent, if it be impossible, the Property never shall vest *(a)*. Marriage in this Instance with the Consent of the Execu ors

(a) Co. Litt. 206; agreeing in Substance with the Rule of the Civil Law, distinguishing between Conditions

1813. PARNELL v. LYON.

Executors was a Condition precedent; which must have been complied with to give the Legatee the Property at the Age of Twenty-one. The Argument, that this is an Interest, to be enlarged on the Performance of a Condition, is not more favorable to the Plaintiffs: the Condition, being precedent, must be performed to have the Effect contended for.

Mr. *Hart*, in Reply.

The Object of the Testator, collected from the whole Will, was to prevent an improvident Marriage before the Age of Thirty; providing the Consent of those, better qualified to judge of the Prudence of the Connection than young and inexperienced Women. Can it be conceived, that he intended any Thing more than a Substitution of the Judgment of others after his Decease; not precluding his own Judgment, while living? In Substance this resembles the late Case of *Coffin* v. *Cooper*. The Testator gave the Residue of his Property to his Children at Twenty-one; adding a Proviso, that if any of his Daughters married with the Consent of his Trustees, such Daughter was to take immediately Two-thirds of her Portion, the other Third to be settled to her separate Use: if without such Consent, then making a different Disposition. One of the Daughters married in the Testator's Life-time, without his Consent: but he afterwards approved the

tions impossible, and difficult to perform:—*Plane conditio difficilis huc non pertinet, quantumvis propter Personæ, cui apposita est, qualitatem aliamve causam videatur impossibilis: sed nisi conditioni pareatur, relictum in testamento non capitur. Finge Libertatem Servo relictam hac conditione, "Si heredi millies dederit." Hic non detrahitur conditio, sed inutilis erit datio libertatis*, &c. (*Vinn. Comm. Just. Inst.* l. 2. t. 14.)

Marriage

Marriage. The Court considered the Clause substantially complied with *(a)*.

1813.
PARNELL
v.
LYON.

The MASTER *of the* ROLLS.

March 8.

Supposing, for the Sake of the Argument, that Mrs. *Parnell* married with Consent of her Father, it is difficult to conceive, however the Will may be expressed, that he could mean a less beneficial Provision for her, than if she had married after his Death with Consent of his Executors. A Husband, approved by them, would have been let into the immediate Possession of her Fortune; for such is the Effect of making it payable to her on her Marriage with their Consent. It would be strange, that he should have meant, that a Husband, approved by himself, should be in so much worse a Condition, as to have only the Interest, until she should attain the Age of Thirty, and no Part of the Capital in the Event of her Death under that Age. His Intention must have been that upon a proper Marriage the Daughter should have her Portion: but in Words the Testator has spoken only of a Marriage, taking place after his Death; that being the only Marriage, the Propriety of which could be ascertained by the Consent of Executors. It is impossible however, that he could intend, if the Propriety of the Marriage should be ascertained by himself, that the same Effect should not be produced: but certainly there is some Difficulty upon the Words. It is therefore satisfactory to find, that the Construction, which the Reason of the thing seems to require, is sanctioned by Authority. In *Clarke* v. *Berkeley* (*b*) under a Devise upon Trust to convey to the Testator's Daughter, in case

(*a*) *Clark et ux.* v. *Lucy*, MS. 5 *Vin.* Ab. pl. 6. *Prodgers* v. *Langham*, 1 *Sid.* 133. 1 *Keb.* 486. On Conditions in restraint of Marriage, generally, see *Clarke* v. *Parker*, 18 *Ves.* and Cases there cited.

(*b*) 2 *Vern.* 720.

1813.
PARNELL
v.
LYON.

she married with the Consent of Two of the Trustees and her Mother, and if she died before Marriage, or married without such Consent, to other Uses, the Daughter having married in her Father's Life-time with his Consent, Lord *Cowper* decreed a Conveyance according to the Will; declaring, that the Condition was dispensed with by having the Testator's own Consent; which was more to be regarded than the Consent of Trustees, to whom he had delegated a Power to consent in case of Marriage after his Decease. In *Crommelin* v. *Crommelin (a)* Lord *Rosslyn* proceeded upon the same Principle; holding such a Condition not applicable to a Daughter, who married, and became a Widow during her Father's Life.

Upon the Authority of these Two Cases therefore I hold, that, if this was a Marriage with Consent of the Father, it is equivalent to Marriage with Consent of the Executors after his Death; and would equally entitle her to Payment of the Portion.

It is said, it ought to have been proved, that the Marriage was with his Consent; and in Strictness it ought: but in such a Case I shall direct an Inquiry into the Fact: the Master to state any special Circumstances.

Mr. *Hart* suggesting an Addition to the Inquiry, viz. whether the Father afterwards approved, the *Master of the Rolls* said, he meant that; and Mr. *Richards* said, it would come in under the Direction to state special Circumstances.

(a) 3 *Ves.* 227.

1813,
Feb. 11.
April 8.

BISCOE *v.* PERKINS.

Trustee to preserve Contingent Remainders joining in a Recovery with the Remainder-man in Tail, having attained Twenty-one, held no Breach of Trust; and no Objection to a specific Performance.

Devise to Trustees, their Heirs, &c. for the Life of the Devisor's Son, to support Contingent Remainders, in Trust to permit him to receive the Rents for Life, and after his Decease to his first and other Sons in Tail: an equitable Estate in the Son: the legal Estate in the Trustees, with a legal Remainder to the first and other Sons.

VINCENT John *Biscoe* by his Will, dated the 7th of *October*, 1768, disposing of his Freehold, Copyhold, and Leasehold, Estates, to his Executors, until his Son *Vincent Hilton Biscoe* should attain the Age of Twenty-one Years, with Remainders in the Event of his Death without Issue Male under Twenty-one to the second and other Sons of the Testator, attaining Twenty-one, successively, proceeded in the following Manner:

" And my Will and Meaning farther is, that if my said " Son *Vincent Hilton Biscoe* shall have attained his said " Age of Twenty-one Years at the Time of my Death, " or if he hath not then attained the said Age, then so " soon after as he shall have attained his said Age, I do " give and devise the said Freehold and Copyhold Mes- " suages, &c. to my Executors hereinafter named and their " Heirs, Executors and Administrators, for and during the " Life of my said Son *Vincent Hilton Biscoe*, to the Intent " to support the Contingent Remainders, in this my Will " after limited, so that the same may not be destroyed; " but in Trust nevertheless to permit and suffer him my " said Son *Vincent Hilton Biscoe* to receive the Rents " and Profits thereof to and for his own Use during his " natural Life; and from and after his Decease then I " devise the said Freehold and Copyhold Messuages, &c. " to the first Son of the Body of my said Son *Vincent* " *Hilton Biscoe* lawfully issuing, whether then born or " unborn, and to the Heirs Male of the Body of such " first Son lawfully issuing; and for Default of such Issue " then likewise to the second, third, &c. Son of my said " Son *Vincent Hinton Biscoe* successively and in Remain-

1813. Biscoe v. Perkins.

"der, the one after the other, &c.;" and in case of all such Issue Male failing then he gave and devised all the said Freehold, &c. to his Executors, their Heirs, Executors and Administrators, in Trust for the Use of and amongst all his Daughters, with Cross Remainders; and for Default of such Issue then to the Use of his own right Heirs for ever.

Vincent Hinton Biscoe, having attained Twenty-one, entered into Possession of the devised Estates. He afterwards married; and had Issue of that Marriage *Thomas Henry Biscoe*; who attained Twenty-one in *March*, 1812.

By Indentures, dated the 29th of *May*, 1812, *Edmund Calamy*, who under the Will of *Nathan Sprigg*, the surviving Executor and Devisee in Trust, had become the sole Trustee, and the Plaintiffs *Vincent Hilton Biscoe* and *Thomas Henry Biscoe*, conveyed to *George Law*, to the Intent that *Law* should become a Tenant of the Freehold; so that Two or more common Recoveries might be suffered to the Use of the joint Appointment of *Vincent Hilton Biscoe* and *Thomas Henry Biscoe*. Recoveries were accordingly suffered in *Trinity* Term, 1812; and soon afterwards *Vincent Hilton Biscoe* and *Thomas Henry Biscoe* joined in a Deed of Appointment; limiting the Estates, subject to an immediate Charge of £300 *per Annum* for the Son, to the Father for Life, without Impeachment of Waste; with Remainder to the Son in Tail: Remainder to Trustees for a Term of 300 Years, upon Trust, if he should die in the Life of the Tenant for Life, leaving Daughters and no Issue Male, to charge £20,000 for those Daughters; and, subject thereto and to a Charge of £12,000 for the Father's Benefit, in consideration of his having discharged the Son's Debts, limiting the Estate to the Father in Fee. This Settlement containing a Power for the Trustees to sell, &c. with the usual Declaration, that

that their Receipts should be Discharges, &c. Under that Power the Estates were put up to Sale; and the Defendant became the Purchaser of one of the Lots.

The Bill praying a specific Performance, the Defendant by his Answer objected to the Title; insisting, that *Calamy*, as Representative of the Trustees, having the legal Estate vested in him during the Life of the Plaintiff *Vincent Hilton Biscoe* for the Purpose of preserving the Contingent Remainders from being destroyed, had been guilty of a Breach of Trust in joining with *Vincent Hilton Biscoe* and *Thomas Henry Biscoe* in suffering a Recovery to defeat such Remainders; and that this Court would not permit a Recovery under such Circumstances to operate effectually to bar such Remainders.

Mr. *Rickards*, Mr. *Newland*, and Mr. *Polson*, for the Plaintiffs.

The Question, whether these Recoveries were well suffered, the Trustee for preserving Contingent Remainders concurring with the Tenant for Life and the Tenant in Tail in destroying them, has been frequently before the Court; and was most compleatly discussed in *Moody* v. *Walters* (a): a Case, though different in Circumstances, the same in Principle as this. In that Case the Act of the Trustees, concurring in the Recovery, was not considered a Breach of Trust; and the Doctrine is laid down, that this Court had in some Instances directed a Trustee to concur in destroying Remainders, when the Object was a family Arrangement; as in *Frewin* v. *Charlton* (b), and *Winnington* v. *Foley* (c): but lately has interfered with Reluctance, unless before the Birth of a Tenant in Tail; after

(a) 16 *Ves.* 283.
(b) 1 Eq. Ca. Ab. 386, pl. 4.
(c) 1 *P. Wms.* 536.

1813.
Biscoe v. Perkins.

that Event leaving it to the Discretion of the Trustees to join, or not; and admitting a Distinction between compelling them to join and treating them as guilty of a Breach of Trust in joining. The Tenant in Tail concurred in these Recoveries; and the general Rule is, that the Inheritance is bound, where the first Tenant in Tail is brought before the Court *(a)*; which is not in the Habit of regarding the subsequent Interests. The Case of a Will or voluntary Settlement differs from a Deed for valuable Consideration or a Settlement before Marriage. The Object of these Recoveries is most provident; and such as a Trustee merely to support Contingent Remainders, until the Parties entitled came into Existence, might be compelled to concur in: by a joint Appointment to give the Tenant in Tail, who was dependent on his Father, an immediate Provision.

Sir *Samuel Romilly*, and Mr. *Kenrick*, for the Defendant.

This Question has never been decided in a Court of Equity; whether a Trustee, specially appointed to preserve the Contingent Remainders, shall be permitted to concur in destroying them without any Object, connected with the general good of the Family: the Object of these Recoveries being clearly no other than to destroy the Remainders, and sell the Estate. Where the only Purpose was to limit in strict Settlement, following and extending the original Destination of the Property and Object of the Parties, the Court has compelled the Trustee to join: but, though it is generally supposed, that the Trustee has a pure Discretion to concur, or not, and that, if he commits a Breach of Trust, a Purchaser cannot be affected, no Decision has sanctioned that Doctrine; and its Correctness may be questioned.

(a) See 1 *Sch. & Lef.* 408. *Lloyd* v. *Johnes*, 9 *Ves.* 37.

The

1813.

BISCOE v. PERKINS. April 2.

The Lord CHANCELLOR.

This, which was set down as a short Cause, involves a Question of considerable Importance. The Will is very singular in its Construction; as in the Event of the Death of the eldest Son *Vincent Hilton Biscoe* under the Age of Twenty-one the Limitation is to second and other Sons successively: but if the eldest Son attained that Age, and had died afterwards without Issue Male, there is no Limitation whatever to the second, third, and fourth, Sons of the Testator: but in that Event the eldest Son takes either a legal or equitable Estate for Life, with Remainders to his first and other Sons; and in Default of Male Issue the Will provides neither for the younger Sons of the Testator nor for the Daughters of his eldest Son; but in that Event limits the Estates to the Daughters of the Testator with Cross Remainders.

The first Question is, whether *Vincent Hilton Biscoe* takes a legal or equitable Estate for Life: if the former, no Question can arise; a Recovery having been suffered upon his eldest Son's attaining Twenty-one. My Opinion however is, that he did not take a legal Estate. The Purpose, for which an Estate is in Terms at least given to the Executors and their Heirs, being to preserve the Contingent Remainders after limited, the Consequence is necessary, that for that Purpose they must have some Estate in them. That brings the Case to this; that this is a Devise to the Executors and their Heirs during the Life of the eldest Son upon Trust to permit him to receive the Rents and Profits for his Life: a Devise of the legal Estate to those Trustees, with a legal Remainder to the first Son of his Body; and they are Trustees, not only as to the Rents for the eldest Son for his Life, but also for preserving the Contingent Remainders after limited:

those

1813.

BISCOE v. PERKINS.

those Remainders being, not only for the first, but for the first and every other Son of the eldest Son.

Vincent Hilton Biscoe, the eldest Son, had Issue Male; and his eldest Son attained the Age of Twenty-one; and without going through all the Facts, that bring the legal Estate into the Individual, who joined in making a Tenant to the *Præcipe*, it is sufficient to say, that the Trustees, the Father and the Son, joined in a Recovery for the Purposes expressed in certain Instruments; and under those Instruments they contracted to sell Part of the Estate to the Defendant. The Bill seeks a specific Performance of that Agreement; and the Defendant's Objection is, that the Act of the Trustee, joining in the Recovery, enabling the Father and the Son, when he attained the Age of Twenty-one, to bar all the subsequent Contingent Remainders, was a Breach of Trust.

The original Limitation being to the Use of the Father for Life, without any Provision for the younger Sons of the Testator, or for the Daughters of his eldest Son, Tenant for Life, he and his Son, having attained the Age of Twenty-one, by Deed, executed about the Time of suffering the Recovery, which I consider as forming Part of the Transaction, limit the Estate to the Intent, that the Son, who had no Provision under the Will until his Father's Death, should receive as the primary Charge upon the Estate, £300 *per Annum;* the Father being made Tenant for Life without Impeachment of Waste, with Remainder to the Sons in Tail; passing over the younger Sons of the Tenant for Life; with Remainder to Trustees for a Term of Five Hundred Years, upon Trust, if the Son should die in the Life of the Tenant for Life, leaving Daughters, and no Issue Male, to charge £20,000 for those Daughters; and, subject to that Charge, limiting the Estate to the Father in Fee. A Sum of £12,000 also

1813.

BISCOE v. PERKINS.

also was charged for the Benefit of the Father in consideration of his having discharged Debts of the Son; and that Sum of £12,000, if received at a future Period, it was supposed, would be what the Son ought to pay in future in consideration of the Discharge of those Debts. That is the Effect of this Settlement.

I have looked through the Case of *Moody* v. *Walters (a)*, the last Decision upon this Subject, and all the Cases to which in delivering that Judgment my Attention was drawn: a Judgment, which was the Result of a very anxious Endeavour to examine every Authority upon the Subject; and with all these Cases upon the Duties and Liabilities of Trustees to preserve Contingent Remainders I find myself under Circumstances very trying to a Judge; as the Task of deducing from them what is the true Principle is greater than I have Abilities well to execute. The Cases are uniform to this Extent; that, if Trustees, before the first Tenant in Tail is of Age, join in destroying the Remainders, they are liable for a Breach of Trust; and so is every Purchaser under them with Notice: but, when we come to the Situation of Trustees to preserve Remainders, who have joined in a Recovery, after the first Tenant in Tail is of Age, it is difficult to say more than that no Judge in Equity has gone the Length of holding, that he would punish them as for a Breach of Trust, even in a Case, where they would not have been directed to join. The Result is, that they seem to have laid down, as the safest Rule for Trustees, but certainly most inconvenient for the general Interests of Mankind, that it is better for Trustees never to destroy the Remainders, even if the Tenant in Tail of Age concurs, without the Direction of the Court.

Trustee to preserve Contingent Remainders joining to destroy them, before the first Tenant in Tail is Twenty-one, liable for a Breach of Trust: so a Purchaser with Notice: but if after the Tenant in Tail is Twenty-one, not punishable, even where the Trustee would not have been directed to join.

(a) 16 *Ves.* 283.

The

1813.

BISCOE v. PERKINS.

Trustees to preserve Contingent Remainders honorary Trustees: not to be compelled to join in destroying them.

The next Consideration is, in what Cases the Court will direct them to join; and, if I am to be governed by what my Predecessors have done, and have refused to do, I cannot collect, in what Cases Trustees would, and would not, be directed to join; as it requires more Abilities than I possess to reconcile the different Cases with reference to that Question. They all however agree, that these Trustees are honorary Trustees; that they cannot be compelled to join; and all the Judges protect themselves from saying, that, if they had joined, they should be punished; always assuming, that the Tenant in Tail must be Twenty-one.

If this is to turn upon the Settlement, afterwards made, it was not improper under all the Circumstances, and the very peculiar Limitations of this Will. Therefore looking at this Settlement, and the Act having been done, even if, according to my Predecessors, I should not have directed them to join, I do not think I can say, they are guilty of a Breach of Trust.

This is not the Footing, upon which it ought to stand. If they are honorary Trustees to support Contingent Remainders for the Benefit of the Family, the Interests of Mankind require Courts of Justice to treat them as such; and, unless Violation of the Trust appears, not to take away all their Discretion; and say, they are not to join, though their Opinion is, that the Interests of the Family require it, without coming to a Court of Equity; the Effect of which is, as I observed in *Moody* v. *Walters*, that the *Lord Chancellor* and the *Master of the Rolls* are the Trustees of all the Estates in the Kingdom.

As I do not find here what I can call a Breach of Trust, my Opinion is, that this Contract must be performed; and I will not go the Length of saying, that this is a Case, in which notwithstanding these Observations,

servations, and though this is my Opinion, I cannot compel the Purchaser to take the Title: but I shall compel him to take it, unless he will reverse my Opinion. That was formerly the Course, instead of letting off a Purchaser upon a doubtful Title *(a)*; and the Purchaser then went to the *House of Lords*. My Opinion is, that this Contract ought to be performed, but without Costs.

1813.

BISCOE v. PERKINS.

Formerly a Purchaser was not let off upon a doubtful Title; but was compelled to take it, or establish the Objection.

(a) *Stapylton* v. *Scott*, 16 *Ves.* 272, and the References in the Note *(a)*, 274.

ADAM, *Ex parte.*

1813, *April* 26, 27.

The Rule in Bankruptcy, that a joint and several Creditor must elect, does not apply to a Contract for double Security against distinct Firms: viz. Bills drawn by all the Partners upon a distinct Firm, constituted of some of them. Proof therefore against both Estates.

A COMMISSION of Bankruptcy issued against Five Persons, carrying on a joint Trade at *Sunderland*, under the Firm of *Samuel Cooke* and Co.; Two of those Five carried on a distinct Trade under the Firm of *Harrison* and *Goss*. The Firm of *Samuel Cooke* and Co. had drawn and negotiated Bills on that of *Harrison* and *Goss*; and under a Petition by the Holders of those Bills the Question was, whether they were entitled to prove against both Estates.

Mr. *Leach*, and Mr. *Agar*, in support of the Petition, relied upon the Firms and the Estates being distinct; and referred to the Cases collected by Mr. *Cooke (a)*.

Sir *Samuel Romilly*, and Mr. *Montagu*, referred to *Ex parte Bevan (b)*, and *Ex parte Liddel (c)* as having materially shaken the former Decisions.

(a) *Cooke*'s B. L. 251, Ed. 6. (by Mr. *Gregg*) 266.

(b) 10 *Ves.* 107.

(c) MSS. by Mr. *Rose*.

The

1813.
ADAM,
Ex parte.
April 27.

The Lord CHANCELLOR.

These Bills were drawn by the House of the Five upon the House of the Two; which were separate Houses; and the Petition prays, that the Holders may prove against both Estates. Upon the Note, handed up to me, it is clear, that what I meant in *Ex parte Liddel* cannot militate against the Principle, which I think must govern this Case. From that Note, I observe, I stated, that, if one House consisted of Two Partners, and another of Three, including those Two, and the Two drew on the Three, there should be Proof against both Firms: if Three gave their joint and several Security, there might be Proof against all: but the Creditor, electing to avail himself of that Proof, could not also go against the separate Estates. The Principle, as there laid down, I take to be according to the clear Law. The Case was singular in its Circumstances; and the only Doubt I had was, whether I applied the Principle properly.

The Petition in that Case represented, that in 1808 *Deprado* was in Partnership with *Groves* and *Hitchcock*, as White Lead Manufacturers: *Groves* and *Hitchcock* residing at *Hull*, and *Deprado* in *London*. In 1809 a Commission of Bankruptcy issued against *Deprado*: in *March* in the same Year a Commission issued against *Hitchcock*. In *February*, 1810, a Petition was presented in the latter Bankruptcy; and, *Deprado* and *Hitchcock* being Partners with *Groves*, (who, being a Minor, could not be a Bankrupt *(a)*,) in the Concern, in which the Bill was given, the usual Order was made for keeping separate Accounts, and for a Distribution of the joint Estate to the joint Debts, and of the separate to the separate Debts; and the Holder of that Bill, who had undertaken to receive an Ac-

An Infant cannot be a Bankrupt.

(a) Ex parte Barrow, 3 *Ves.* 554.

ceptance

ceptance in Payment, had gone in under that Commission against *Hitchcock*, as a joint Creditor, to take Advantage of the Order, made under the separate Commission, for keeping distinct Accounts, &c.; not insisting upon a joint Demand by force of the Contract, but by the Law, as against a sleeping Partner, he had proved as a joint Creditor; and received a Dividend from the joint Effects of *Hitchcock*. Afterwards an Application was made under the other Commission, insisting, that Property in the Hands of the Assignees of *Deprado* was joint; and seeking a Distribution of that Property in the same Way among the joint Creditors of the Three. That was determined to be joint Property; and, being so, a farther Distribution of it was made among the joint Creditors.

The Holder of that Paper therefore, being a Creditor under the Contract the Law raised against visible and dormant Partners, received, first, a Dividend out of the joint Estate under *Hitchcock*'s Bankruptcy, and a farther Dividend out of the joint Estate und erthe Commission against *Deprado*; and insisted farther, that he was entitled to prove against the separate Estate of *Deprado*; not having so insisted against the separate Estate of *Hitchcock*. The Commissioners determined that he was not entitled to be considered a joint Creditor, but he was a separate Creditor under both Commissions. The Assignees of *Deprado*, dissatisfied with that Decision, petitioned, that the Proof should be expunged as against his separate Estate; and upon the Affidavits the Struggle was, that he should be considered as a joint Creditor; not as the separate Creditor of *Deprado*. My Opinion was, that he had made his Election, if it was a Case of Election, by proving against the joint Estate under *Hitchcock*'s Commission, and also under the other Commission; that he was entitled to be restored to the joint Proof under *Deprado*'s Bankruptcy, but was not to be considered a separate Creditor.

The

1813.
ADAM,
Ex parte.

The only Question, that can be made upon that Case, is, whether I correctly applied the Principle, which I now think ought to govern this Case. Here being an express Bargain for double Security, the Parties are, I think, entitled to it; the Houses being distinct; therefore this is not within the Rule of Election, where Five jointly and severally contracted, but not as Persons engaged in different Houses and Trades.

The Order was made according to the Prayer of the Petition.

1813,
April 5.

SEAGEARS, *Ex parte*:—In the Matter of the MANIA CHARITY.

Under the Act of Parliament, giving Jurisdiction upon Petition in Charity Cases, the Trustees, not appearing, ordered to shew Cause, why the Order prayed should not be made.

UNDER the late Act of Parliament *(a)*, giving Jurisdiction to the Court to proceed in Charity Matters by way of Petition, this Petition was presented; charging the Trustees of the Charity Estate with Breaches of Trust; and praying their Removal; and that the Master might approve of a Scheme for the future Regulation of the Charity. The Trustees were not served; and did not appear.

Sir *Samuel Romilly*, and Mr. *Newland*, for the Petitioner.

The *Lord Chancellor* expressed some Doubt, whether he had Authority under the Act of Parliament to pronounce any Order; the Trustees not appearing: but

(a) 52 *G*. 3. c. 101.

upon

upon the Suggestion of the Counsel, an Order was made, that the Trustees do on the next Day of Petitions shew Cause, why the Court should not make an Order according to the Prayer of the Petition, or such other Order as to the Court shall seem meet.

1813.
SPAGEARS, *Ex parte.*

JOSEPH *v.* DOUBLEDAY.

1813.

Injunction against a Verdict in a joint Action dissolved as against those Defendants, who had answered: not as against all pending Exceptions to the Answers of the rest.

THE Bill prayed a Discovery, and an Injunction to restrain the Defendants, the Assignees under a Commission of Bankruptcy against some Partners, and the Partners remaining solvent, from proceeding at Law as the Holders of a Promissory Note, upon which they had obtained a Verdict. The solvent Partners had put in their Answer; upon which they obtained the Order *Nisi* to dissolve the Injunction generally, which had issued for want of an Answer; although the other Defendants the Assignees had not put in their Answer.

Mr. *Newland*, for the Defendants, after *Trinity* Term, 1810, moved to make that Order absolute.

Mr. *Agar*, for the Plaintiff, objected, that the other Defendants, the Assignees of the Bankrupts, had not put in their Answer.

The Lord CHANCELLOR said, that certainly Cases might exist, where such a Circumstance would not be a sufficient Ground against dissolving the Injunction; but that Question was not decided; as Exceptions for Cause were shewn.

1813.

JOSEPH *v.* DOUBLEDAY.

The solvent Partners afterwards put in a farther Answer; and the Assignees also put in their Answer; to which Exceptions were taken. The solvent Partners afterwards obtained an Order *Nisi* to dissolve the Injunction only as against them; and on their Motion to make that Order absolute Mr. *Agar* shewed Cause on the Merits; but the *Lord Chancellor* dissolved the Injunction absolutely against the Defendants the solvent Partners. Afterwards they obtained an Order *Nisi* for dissolving the Injunction against all the Defendants; though the Assignees had not put in their farther Answer to the Exceptions. The Motion to make that Order absolute was resisted on Two Grounds: first, that such a Motion could not be made by the solvent Partners; secondly, the Exceptions, taken to the Answer of the Assignees were shewn as Cause against dissolving the Injunction.

Mr. *Newland*, in support of the Motion, contended, that, if the Defendants the solvent Partners were not allowed to make this Motion, the Injunction would never be got rid of; as the Assignees were not disposed to put in a farther Answer; and the Plaintiff was not desirous, that they should; and that the solvent Defendants, if they took out Execution, would be guilty of Breach of the Injunction; as the Judgment was joint, and Execution must be in the joint Names of all the Defendants. Upon the second Ground, he said, that no material Discovery could be expected from the Assignees; who by their Answer expressly denied all Knowledge of the Matters, insisted upon as Ground for the Injunction.

The *Lord Chancellor* declared his Opinion, that it was competent for the Defendants, the solvent Partners, to make this Motion: but that the Injunction could not be dissolved pending the Exceptions to the Answer of the Assignees (*a*).

(*a*) *Ex Relatione*, Mr. *Newland*.

FINDLAY

1813,
March 15. 29.

FINDLAY *v.* WOOD.

In the Undertaking to speed the Cause upon the Motion to dismiss for want of Prosecution the Term includes the Vacation.

THE Defendant moved to dismiss the Bill with Costs for want of Prosecution: the Plaintiff not having proceeded pursuant to an Order, dated the 4th of *December*, 1812; when he entered into the usual Undertaking upon a second Motion to dismiss.

Mr. *Bell*, for the Plaintiff, contended, that the Motion was premature: the Plaintiff being entitled to the whole Term and the Vacation to proceed: *Mangleman* v. *Prosser (a)*.

Mr. *Wear*, for the Defendant, admitting the Practice in Lord *Thurlow's* Time to have been, as represented, said, the modern Practice authorised the Motion immediately upon the Expiration of the Term; referring to the Practice, as stated in the Note to *Bligh* v. ——— *(b)*.

The MASTER *of the* ROLLS, sitting for the *Lord Chancellor*, having refused the Motion, as premature, it was renewed before his Lordship.

The Lord CHANCELLOR.

The Question is, what is meant by the Expression "another Term." I have always understood, that the Term draws the Vacation along with it; and, if the antient Practice was, as it is admitted to have been, I certainly cannot recollect, when, if ever, it was altered.

No Order was made.

(a) 3 *Bro. C. C.* 191. *(b)* 13 *Ves.* 455.

1813,
May 3.

RUSSELL v. SHARP.

On Abatement by Bankruptcy of a Defendant, an Executor, after a Decree for an Account, supplemental Bill in Nature of Bill of Revivor necessary.

AFTER the usual Decree for an Account against Executors, one of them, the Defendant, *George Sharp*, became a Bankrupt. The Assignees by Petition prayed, that they may be at liberty to go before the Master upon taking the Accounts; and may be admitted on behalf of the Bankrupt's Creditors to support his Discharge.

Mr. *Wingfield*, in support of the Petition.

The Register declined drawing up the Order; objecting, that, the Suit being abated by the Bankruptcy, the Plaintiffs could not proceed in the Accounts, until they had filed a supplemental Bill in the Nature of a Bill of Revivor.

The Lord CHANCELLOR refused to make the Order.

1813,
May 6 7.

GIBSON v. CLARKE.

Though generally a Purchaser cannot be called on for his Money, until he has a Title, yet, where he is let into Possession upon a mutual Confidence of a speedy Title, and the Difficulty is a mutual Surprise, he cannot, without express Contract, retain the Possession, withholding the Money.

THE Bill prayed the specific Performance of a Contract for the Sale of an Estate. The Purchaser, having taken Possession, and paid Part of the Purchase-money, took Objections to the Title, and also that the

Quantity

Quantity of Land did not correspond with the Representation in the Particular. Under these Circumstances the Vendor moved, that the Residue of the Purchase-money should be paid into Court.

1813
GIBSON
v.
CLARKE.

Mr. *Leach*, and Mr. *Abercromby*, in support of the Motion. Sir *Samuel Romilly*, Mr. *Hart*, and Mr. *Courtenay*, for the Purchaser, opposed it.

The Lord CHANCELLOR.

This is a Motion of very great Importance, as a general Precedent: I shall therefore state the general Observations, which will regulate my Judgment. I have frequently acted upon the Principle, that, where under a Contract for the Purchase of an Estate Possession has been taken, and the Estate is therefore taken out of the Hands of the Owner, the Court should have a great Anxiety to take the Money from the Purchaser: but cannot go that Length, where under the Agreement it seems, the Vendor has thought proper to put the Purchaser in Possession with an Understanding between them, that he shall not pay his Money, until he has a Title. If the Vendor has been so foolish, he must abide by his Contract: but, where both Parties are acting under the Confidence of a speedy Title, which Confidence is not made good, and that is a Surprise upon both, though it would be too much to call upon the Person, taking Possession of the Land, to pay the Money, before he has his Title, yet in that Case of mutual Surprise there can be no Justice in permitting him to keep Possession of the Land. This therefore may prove a middle Case: though it may not be just to call upon the Purchaser at this Moment to pay his Money, he may be properly required to restore the Land. He must do the one or the other, unless the Vendor intended to trust him, and that was their Contract, with the Possession of the Land, until the Vendor by making a

1813. GIBSON v. CLARKE.

Conveyance of the Estate made out his Title to the Money.

This is my general View of these Cases. I think it right; and from the frequent Instances of Men buying Estates, not meaning to pay for them, until they sell again, it is necessary to apply that Principle; and to take care in these Cases, that Property shall not change Hands on one Side, until it does so on the other.

The Lord CHANCELLOR.

May 7. In this Case the Possession appears to have been given and taken under a mutual Apprehension, that the Title could be immediately made good. If that proves to be Misapprehension, and the Purchaser insists on holding Possession under such Circumstances, he ought at least to pay Interest for the Purchase-money.

The Purchaser then agreed to restore the Possession; accounting for the Rents; without Prejudice to any Question between the Parties, in case a specific Performance of the Contract should be decreed.

SCOTT

1813,
March 27.
May 8.

SCOTT *v.* MACKINTOSH.

Injunction not revived pending a Rehearing of an Order, allowing an Exception to a Report, that the Answer was insufficient.

Bill for an Account under Covenant upon Sale of Goodwill not to carry on the Trade.

The usual Course a Bill of Discovery for an Action.

THE Defendant, carrying on Business as a Provision Merchant and Provision Broker, having in 1806 agreed to sell his Business of a Provision Broker to the Plaintiffs, by a Deed, dated the 20th of *December*, 1806, sold and assigned to the Plaintiffs his Business as a Broker in the Purchase and Sale of Foreign Butters (except *Irish*), Hams and Cheese in the City of *London*, from the 31st of *December*, 1806; covenanting, that he would not use or exercise the Trade of a Broker in the Purchase or Sale of Foreign Butters, &c. (in the Terms before stated); reserving the Right of acting or trading as a Merchant either in the Articles before stated or any other.

The Bill, alleging, that the Defendant had notwithstanding his Engagement continued to act as a Broker for other Persons, who paid him the usual Commission of 1 *per Cent*, and also in the Disposal and Sale of the Goods, imported by himself as Merchant, contrary to the Usage of Merchants in the City of *London*, prayed an Account of all the Cargoes of Provisions, imported by him since the 1st of *January*, 1807, and of the Commission received by him; that the Plaintiffs might be declared entitled to a Commission of 1 *per Cent.* upon the Produce of all such Goods; an Account against the Defendant as Broker: and an Injunction, restraining him from acting as Broker, and proceeding at Law for the Instalments, remaining due on the Purchase.

An Exception was taken to the Answer, as insufficient in not setting forth an Account of the Cargoes of Provisions, imported by the Defendant, and of all Sums re-

1813.
SCOTT
v.
MACKINTOSH.

ceived by him, produced by the Sale of such Cargoes, and the Names of the Purchasers. The Master having allowed the Exception, the Defendant excepted to his Report; which Exception the *Master of the Rolls*, sitting for the *Lord Chancellor*, allowed.

A Motion was made to revive the Injunction, to restrain the Defendant from proceeding at Law, until the Exception, taken to the Master's Report, should be re-heard.

Mr. *Hart*, in support of the Motion; Mr. *Leach*, and Mr. *Wingfield*, for the Defendant.

It was said, that the Master's Judgment against the Answer proceeded on the Ground, that the Defendant, submitting to answer, was bound to answer fully (a): but in Reply it was insisted, that this Rule binds the Defendant to answer only as to what is material to the Relief.

The Lord CHANCELLOR.

This Motion proposes to revive an Injunction, upon Matter already in the Answer, which Answer the Court now thinks sufficient, but which the Master originally thought insufficient; and farther, to revive the Injunction upon the Ground, that, the Judgment of the *Master of the Rolls*, that the Answer is sufficient, being under Appeal, the final Judgment of the Court may be with the Master, that the Answer is insufficient, against the Opinion of the *Master of the Rolls*, and therefore the Injunction ought to be revived. I never will revive an Injunction upon that Ground. A more mischievous Practice could not be introduced than, where the Judgment of the Court is, that the Answer is sufficient, upholding an Injunction upon the Supposition, that the Judgment may be reversed.

(a) *Rowe* v. *Teed*, 15 *Ves.* 372. *Leonard* v. *Leonard*, 1 *Ball* and *Beattie*, 323.

The

1813.
SCOTT v. MACKINTOSH.

The old Rule was, that the Master's Report should be procured in Four Days; and if in his Opinion the Answer was sufficient, the Injunction was gone. The Master's Opinion against this Answer was over-ruled by the *Master of the Rolls*; and if the Court should lay down the Rule, that in every Instance of an Attempt by Re-hearing or Appeal, as the Judgment may be reversed, for that Reason the Injunction shall revive, it would be quite endless; and Injunction would prove a most ruinous dilatory Proceeding. Therefore I shall certainly not interfere on that Ground.

With regard to the Merits, the Defendant sold to the Plaintiff the Good-will of his Business as a Broker, and the Profits specifically of all the Brokerage he should make. Where a Man sells the Good-will of a Trade, and covenants to make it as profitable as he can, the actual Profit made is not that, which the Vendee is bound to take; but he will have an Action of Covenant, if he can establish his Title to more through the Default of the Vendor. There can be no Custom, binding a Man not to sell his own Provisions. With regard to the Consignments there is more Doubt; but not much upon that, if he was not distinctly acting as a Broker. The only Point, on which the Plaintiff can stand, is the Allegation, that the Defendant has dealt as a Broker; and to what Extent is not mentioned. The Result of what has passed at Law is, that £750 was paid into Court by the Defendant in the Action brought by the Plaintiff; who, having taken out that Sum, was afterwards nonsuited. He has therefore had the good Fortune to obtain £750 in an Action, in which he is nonsuited; which Sum must be set off against the Sum, about £1200, remaining due on the Purchase. Am I then to revive the Injunction upon the Possibility, that he will be entitled to something more? If this Answer is sufficient, whose Fault is it, that he cannot be told, what Sum *ultra* he is entitled to? He does not call upon the

Defendant

1813. SCOTT v. MACKINTOSH.

Defendant to state, what would be the Result of the Account; but wishes to protect himself from paying the Balance of his Purchase on the Ground, that he may be able to shew some small Sum due beyond the £750; and that in a Case, where Insolvency is not suggested.

My Opinion therefore is, that this Injunction should not be revived. I do not recollect an Instance of a Bill for an Account upon a Covenant not to carry on a particular Trade. The usual Course is a Bill of Discovery for the Purpose of an Action.

1813, *May* 11.

BRYANT, *Ex parte*.

Ante, 211.

Though a Bankrupt would be restrained from repeated Attempts to supersede the Commission, amounting to Vexation, he was not prevented from bringing a second Action: but pending that Action and an Inquiry, directed relative to an Estate, by the Sale of which he proposed to pay his Debts, the Commission was ordered to proceed in the usual Course.

THIS Petition (a) stood for Judgment.

The Lord CHANCELLOR.

There is no Instance of this Court enjoining a Bankrupt from trying his Bankruptcy more than once, or in other Words of quieting the Assignees and other Persons, entitled under the Commission, until his Attempts to supersede it become so vexatious from their frequency, that it is fit by the Power of the Court to put an End to such Proceedings. The Consequence is, that the Assignee under this Commission is placed in a Situation of great Difficulty; as he will be personally answerable for every Shilling of the Property, which he shall distribute under the

(a) *Ante*, 211.

the Commission, if the Petitioner should finally succeed in overturning it.

1813.

BRYANT, *Ex parte.*

Under those Circumstances, the Petitioner offering an Estate, to which he represented himself as having a good Title, and sufficient in Value for the Satisfaction of his Creditors, and undertaking to join in a Sale for that Purpose, it appeared to me to be the best Course for the Creditors to direct an Inquiry, which I hoped would terminate, before the Trial of the second Action, brought by the Bankrupt, with the View of bringing into Court a Fund, that would pay the Creditors: but I did not mean by that to create Delay; and, not meaning to blame the Petitioner for making a Record, that will probably take the Case to the House of Lords, if it runs, perhaps not improperly, to great Length, I cannot prevent the regular Proceedings under this Bankruptcy. Therefore, not removing this Assignee, or doing any thing farther, I shall make this Order, that the Commissioners shall proceed in the Bankruptcy, as they do in ordinary Cases.

TASBURGH'S CASE.

1813, *May* 3.

Form of separate Examination of a married Woman, taken by Commission.

BY the Return to a Commission to examine *Mary Augusta Rosalia*, the Wife of *Michael Tasburgh*, under an Order, dated the 26th of *February*, 1813, the Commissioners certified, that she did attend them; and was examined solely and apart from her Husband at his Dwelling-house by virtue of the said Order.

The

1813
TASBURGH'S Case.

The Examination of Mrs. *Tasburgh* states, that she is willing and desirous, that the several Sums in the Order mentioned shall be paid, and the Securities transferred, to the Trustees to be named in the Settlement, to be executed pursuant to Articles, previous to her Marriage, upon the Trusts of that Settlement; and that the Sum of £1000 may be paid, or the Securities transferred, to the said *Michael Tasburgh* for his own Use.

The Signatures of Mrs. *Tasburgh* and of the Commissioners were proved by Affidavit.

Mr. *Spence*, in support of the Petition, presented under this Certificate.

The Lord CHANCELLOR.

This Petition relates to a Subject of considerable Importance: the Return to a Commission for the Examination of a married Woman. The Return in this Instance, though conformable to some late, very loose, Proceedings, is by no Means agreeable to the Practice, and the antient settled Form. These private Examinations of Ladies in the Country, are, I fear, more frequently Examinations by the Husband than by the Commissioners; and upon a Subject of so much Consequence I do not choose to depart from the Form, which was most carefully settled with the View to give as much Protection as the Circumstances would enable the Court to give. In future therefore I shall expect, that the Returns to these Commissions shall be made according to the antient and proper Form.

The following Precedents, produced by Mr. *Croft*, the Register, were referred to by the *Lord Chancellor*.

Under

Under a Commission to take the Examination of *Dorothy*, the Wife of *John George Wessback*, the Commissioners certified, that pursuant to an Order, dated the 30th of *July*, 1783, they attended the said *Dorothy Wessback;* and, after having separately and apart from her Husband read to her the Deed, dated the 12th of *April*, &c. in the Decree mentioned, and explained to her the Purport and Effect thereof, they did examine her separately and apart from her said Husband, whether she had freely and voluntarily executed the said Deed; and whether she was consenting, that the same should be carried into Execution; and on such Examination she did declare, that she had executed the said Deed freely and voluntarily; and was consenting and desirous, that the same should be carried into Execution; and that they took down such her Examination or Declaration in Writing; and that she thereupon signed the same; as the same now appears above.

By the Examination, referred to in that Certificate, signed by *Dorothy Wessback*, she declared, that she freely and voluntarily executed the Deed; and is well acquainted with the Purport and Effect thereof; and desires, that the same may be carried into Execution.

Under another Commission the Commissioners certified, that pursuant to an Order in the Cause, dated the 21st of *February*, 1786, they had been attended by the Plaintiffs *Hannah*, the Wife of *Robert Dockray*, and *Mary*, the Wife of *John Graves*; and had in pursuance of the said Order examined *Hannah Dockray* solely and secretly, separately and apart from the said *Robert Dockray*, her Husband, how and in what Manner and to what Uses she was willing and desirous her Third Part of the Sum of *£*575 : 10*s* : 5*d*. Cash, in the Bank, in the said Order mentioned,

1813.

TASBURGH'S Case.

tioned, should be paid and applied; and they did at the same Time read the said Order to her, and explain to her the Purport and Effect thereof; and do certify, that the said Plaintiff *Hannah Dockray* did on such her Examination say and declare, she was willing and desirous, that the Sum of £191: 16s: 10d., being her Third Part of the said Sum, might and should be paid to the said Plaintiff *Robert Dockray* to and for his own Use and Benefit; and she did thereby freely and voluntarily consent, that the same be paid to him accordingly.

Hannah Dockray by her Examination in Writing, and signed by her, states, that she being solely and secretly examined by the said Commissioners, separate and apart from her Husband, how and in what Manner and to what Uses she is willing and desirous, that her Third Part, &c. should be paid and applied, does say and declare, that she is willing and desirous, that the Sum of £191: 16s: 10d., &c. may and shall be paid to the said *Robert Dockray*, her Husband, to and for his own Use and Benefit; and she does truly, freely, and voluntarily, Consent, that the same may be paid to him accordingly.

As to the Share of *Mary Graves* the Certificate and Examination were expressed in the same Terms; and the respective Signatures of the Parties and the Commissioners were verified by Affidavit.

HOWE *v.* DUPPA.

1813, *May* 12.

Plea with an Exception, not requiring a Reference to the Answer, allowed.

To a Bill to set aside a Conveyance for Fraud, &c. Plea of Title paramount under a former Conveyance of all the Estate and Interest, under which the Plaintiff claimed, allowed.

THE Bill was filed by the Executor of *Baldwin Duppa*, for the Purpose of setting aside an Agreement, dated the 22d of *October*, 1791, and Conveyances in pursuance of it in 1792 and 1793, of all the Estate and Interest of *Baldwin Duppa* to the Defendant, his Son: alledging Fraud, Inadequacy of Consideration, Concealment of Value, &c.; stating the Title under the Will of *Baldwin Duppa*, the elder, devising to *Richard Duppa* for Life, with Remainder to his first and other Sons in Tail, and in Default of such Issue, to his Brother *Baldwin Duppa* for Life, and to his first and other Sons in Tail. In 1789 *Richard Duppa* died without Issue.

The Defendant by a Plea to the Relief and Discovery, except as to such Estates as were purchased in the Name of *Richard Duppa*, and conveyed to the Uses of the Will, set up a Purchase for valuable Consideration by Indentures, dated the 2d of *August*, 1780, from *Baldwin Duppa* by *Richard Duppa* of all *Baldwin*'s contingent and other Interest under the Will, subject to an Annuity of £400 in Trust for him.

Sir *Samuel Romilly*, and Mr. *Owen*, for the Plea.

Whatever may be alledged in respect of the Agreement of 1791, and the Deeds, made in pursuance of it, the Plaintiff can have no Relief, whilst the Purchase of 1780 is unimpeached; that Deed devesting all the Right and Interest of *Baldwin Duppa*. The subsequent Instruments are therefore merely voluntary on the Part of the Defendant. This is in Substance a Plea, that the Plaintiff has

no

1813.
Howe
v.
Duppa.

no Title; which, though a negative Plea, is unquestionably good (a).

Mr. *Richards*, Mr. *Hart*, and Mr. *Cooke*, for the Plaintiff.

This Plea is framed to meet a different Title from that stated by the Bill. Touching neither the Agreement of 1791, nor the subsequent Deeds, and compleatly overlooking the Subject of the Suit, the Plea relies on the Deed of 1780 alone. The Presumption is, that in the subsequent Period the Deed of 1780 was released; and the Defendant, dealing with *Baldwin Duppa* as Tenant for Life in Possession, is esstopped from saying, that he was dealing for nothing. That Transaction is utterly inconsistent with the Allegation that *Baldwin Duppa* had then no Interest to dispose of. The Execution of the Deed of 1780, whatever may be its Effect, cannot prevent the Equity to have the Deeds, impeached for Fraud rescinded, or removed, as Clouds upon the Title.

Another Objection to this Plea is, that it is not clear. A Plea must unequivocally point to that, to which it applies, not by Exception. Thus, a Plea to such Parts of the Bill as are not answered is bad (b). How can the Court know, what this Plea covers, without looking into the Answer; which must be resorted to for the Purpose of ascertaining the Extent of the Plea? That Objection was taken by Lord *Hardwicke* in *Salkeld* v. *Science* (c). The Plea is likewise bad, as not being a direct Denial of Plaintiff's Title. There is not a direct Averment, that

(a) See Lord *Redesd. Tr. Pl.* p. 188, 189; and *Cooper*'s *Tr. Pl.* p. 219; and the Authorities there cited.

(b) See Lord *Redesd. Tr. Pl.* p. 233; and *Coop. Tr. Pl.* p. 229; and Authorities there cited.

(c) 2 *Ves.* 107.

Baldwin

Baldwin Duppa did not on the Death of his Brother *Richard Duppa*, the preceding Tenant for Life, become Tenant for Life in Possession: but that important Fact is only to be collected by Inference.

1813. HOWE v. DUPPA.

Sir *Samuel Romilly*, in Reply.

This Plea is confined to the Estates, alledged to be the Property of the Testator at the Time of his Death: and contends, that the Plaintiff is not entitled to Relief: a Plea, of which one Species is, that the Plaintiff is not Heir at Law *(a)*. Admitting these Deeds to be fraudulent, it sets up a Title paramount the Plaintiff's; alledging in Substance, that the Defendant was deceived by *Baldwin Duppa* in purchasing what did not belong to him, having previously sold these very Estates to *Richard Duppa*. The *Dictum* of Lord *Hardwicke (b)* is inapplicable to this Case; and means, not that a Plea with an Exception is bad, but a Plea with an Exception, generally, of what is not answered *(c)*. If the Exception, as in this Instance, is clearly pointed, there is no Objection to it: otherwise a Plea, which covered every thing "Except *Whiteacre*" would be bad. Had this Plea proceeded to negative the Execution of any Deed intervening between 1780 and 1796, which, it is suggested, may be presumed, the Plea would have been open to Objection, as multifarious.

The VICE-CHANCELLOR. 1813, *May* 12.

Two Objections are made to this Plea: one of Form: the other of Substance. The Objection of Form is, that the Plea contains an Exception, which cannot be distinctly

(a) See *Cooper Tr. Pl.* p. 249, 250; and Lord *Redesd. Tr. Pl.* 223, and Authorities cited.

(b) Salkeld v. *Science*, 2 *Ves.* 107. 3 *Atk.* 70. *Moseley.* 40.

(c) Wetherhead v. *Blackburn*, *post*.

1813.
HOWE
v.
DUPPA.

Plea, with Exception of Matters after mentioned, bad.

understood without having reference to the Answer; whence the Court must collect the Meaning and Extent of that Exception; and in support of that Exception the Passage in *Vesey* was referred to; where Lord *Hardwicke* states, that all Pleas in this Court, containing Exception of Matters hereinafter mentioned, are bad; as it is impossible for the Court to judge, what the Plea covers without looking into the Answer; which may be sufficient, or not; and the Court must judge of the Sufficiency of the Answer, before they can judge of the Validity of the Plea.

In that Passage I understand Lord *Hardwicke* to be speaking of the Phraseology of the Plea; which, if defective on the Face of it, containing a Reference to some other Part of the Record, is not perfect, substantial, or intelligible, in itself: and the Court cannot form a Judgment upon it without referring to some other Part of the Record. That Objection does not apply to this Plea; which only excludes all that Property, that might have been procured by laying out Part of the personal Estate in the Purchase of Land subsequently to the Deed of 1780; in which Case that Deed would not cover that Property. In this respect the Plea requires no Reference to any other Part of the Record to make it intelligible. It is perfectly intelligible of itself; covering all the Property, that passed by the Deed of 1780, but not covering Property acquired after that Date. The Exception therefore does not make this Plea invalid and unintelligible on the Face of it; requiring a Reference to any thing else to make good that, which upon the Face of it is defective.

With regard to the Substance of this Plea, *Baldwin Duppa*, having under the Will only a contingent Interest, depending on the Death of *Richard Duppa* without Children, came to an Agreement, in consideration of a Debt, contracted by Money advanced for the Education of his Children

Children by *Richard Duppa*, then in Possession as Tenant for Life under the Will, to relinquish absolutely all the real and personal Property, to which he *Baldwin* might ever be entitled under that Will. This Agreement, which led to the Deed of *August*, 1780, was a very natural Transaction in the Family; standing upon valuable Consideration; and, if it remained unimpeached from that Time, the Consequence is, that from the Execution of that Deed *Baldwin Duppa* ceased to have any Kind of Interest in any Part of the Property; at least in all, that was purchased previously to 1780; unless there was afterwards a Reconveyance. The Property was absolutely parted with; and the only Interest remaining in him was the Annuity of £400 under the first Trust of this Deed. It does not appear, that this Deed was ever questioned, though he lived Fifteen Years, surviving his elder Brother Six Years, except as it may be collected from what passed in 1791. By Deeds, executed in that Year, it appears, that *Baldwin Duppa*, affecting some Sort of Controul over the Estate, again parted with his Interest; making certain Provisions for his Family, but upon a Consideration very inadequate, if he was then really in Possession of all the real Estate; the annual Value of which exceeded £1000: but the decisive Answer to this Bill is, that the Fact was mistaken: at the Date of those Deeds he had no Interest whatsoever in the Property; having Eleven Years before by the former Deed parted with all his Interest: a Fact, which remaining unimpeached destroys the whole Foundation of this Bill; which proceeds upon a supposed Interest in him in 1791. He may controvert the Existence or Validity of that Deed of 1780: it is a possible Case, that he may have again acquired the Estate before 1791; but there is nothing in these Pleadings shewing that. As it now stands, he had parted with all his Interest; and I cannot presume, that he ever regained it. That affords a compleat Answer to his

 Prayer

1813. Howe v. Duppa.

Prayer of Discovery and Relief. There is therefore no Objection to this Plea either in Substance or Form.

The Plea was allowed.

1813, *May* 13.

—— v. SKELTON.

Reference before Decree confined to the Case of Title. Where there was a farther Subject of Dispute, under a Claim of Compensation, it was refused with Costs.

UNDER a Bill for the specific Performance of a Contract for the Sale of an Estate a Motion for a Reference to the Master before Decree was resisted on the Ground, that the Title was not the only Subject in Dispute: the Purchaser claiming an Abatement of the Price on account of Misrepresentation *(a)*.

Mr. *Leach*, in support of the Motion.

The Question as to the Purchaser's Right to Compensation is consistent with the Object to have the Title made out and the Contract performed. The same Principle of Convenience therefore, which is the Foundation of this Rule of Practice, where nothing is in Dispute except the Title, justifies the Reference, where there is no other Objection to perform the Contract except the Claim of Compensation.

Sir *Samuel Romilly*, against the Motion.

(a) Eldridge v. *Porter*, 14 *Ves.* 139, and the References in the Note *(b)* 140.

This

1813.

v.
SKELTON.

This Practice is modern, within the last Thirty Years: first established by Lord *Thurlow*; where nothing but the Title was in Dispute; and that has been since followed; the Court professing to go no farther. The Principle must be to save Expence, and bring the Cause to a more speedy Conclusion: but the Effect in this Instance will be the Reverse; as there must be Two Reports.

Mr. *Leach*, in Reply, said, the Principle is to prevent unnecessary Delay by procuring a Report upon the Title now instead of Six Months hence; and, admitting, that the Claim to an Allowance may require another Report, it will be a very short one.

The VICE-CHANCELLOR.

The Propriety of this Application stands entirely upon the Practice. Where the single Point of Title is in Dispute, and there is no possible Reason for going through with the Cause, it has been found convenient to take this short Course even without Consent: but the same Reason does not apply to a Case of a mixed Nature; which cannot be entirely determined by the Order of Reference; but must be brought to a Hearing; and, if the Effect may be some saving of Time, the Expence may be increased by Two distinct Orders and Reports in One Event at least. It is however not to be argued on Principle; but rests entirely on Practice; and I will not carry it farther without a Precedent (*a*).

The Motion was refused with Costs.

(*a*) *Blyth* v. *Elmhirst*, *ante*, 1.

1813,
May 15, 18.

SMITH, *Ex parte*.

General Assignment of all Effects an Act of Bankruptcy; giving therefore no Lien: but a Lien under a previous Deposit and Execution was not affected.

Discretion of the Great Seal to order Proof in Bankruptcy upon a Valuation, instead of a Sale of Securities regulated by Circumstances; and not too readily exercised.

Property in the Possession and Disposal of a Bankrupt passes to the general Creditors by Stat. 21 *Jam.* 1. c. 19, s. 11, against his Assignment.

IN *May*, 1812, *John Willock* issued a Writ of *Fieri Facias* against *William Hervey* for a Debt of £550; and took his Goods in Execution. At a Meeting of his Creditors the Petitioners, who were Creditors for £708: 6s: 2d. proposed to pay 10s. in the Pound upon his Debts; he paying 5s. more; and that they would pay off the full Amount due to *Willock* in Discharge of his Execution, and the full Amount of the Rent; taking an Assignment to themselves of his Effects for their own Benefit. This Offer being accepted, a Memorandum was signed accordingly; and *Hervey* signed a Memorandum, by which in consideration of the Debt due to the Petitioners, and of their having agreed to pay such Sums to the Creditors, he agreed to assign over to them for their own Use and Benefit all his Leases, Plate, Stock, and other Estate and Effects, and all Debts due to him: but he was to remain in Possession; and to collect his Debts. In pursuance of this Agreement the Petitioners gave their Bills to the Creditors: paid £560: 1s. to the Sheriff in Discharge of *Willock*'s Execution; and paid the Rent; and they received from *Willock* Two Leases, deposited with him by *Hervey*, as a Security, and a large Box of Plate, also deposited by him. By Indenture, dated the 4th of *June*, 1812, but executed on the 17th of *August*, *Hervey* assigned to the Petitioners for their own Use all the Furniture, Fixtures, Wines, Stock, Property, and other Effects, contained in Two Valuations, amounting to £1100 and £580, being the Property and Wines in his House and Cellar; agreeing to assign a Lease; which had been mislaid; declaring that Assignment to be in full Satisfaction of the Petitioners' original Debt, of the Money paid by them, or which they were liable to pay, to the Creditors; and of all

all Money due from *Hervey* to them on the 1st of *June* instant. The Petitioners Debt having increased to £4021 : 4s: 5d. on the 26th of *April*, 1813, a Commission of Bankrupt was taken out against *Hervey*, on the Petition of *William Ewart*; who had received the Composition.

The Petitioners, having had the Two Leases appraised at £800, the Fixtures at £140, and the Plate at £250, (amounting altogether to £1190), prayed, that the Petitioners may be at Liberty to sell the Leases, the Plate, and the Fixtures; and to retain the Produce of the Sale, in case it shall not exceed £1190, in Part of their Debt; submitting, if there should be any Surplus beyond £1190, to pay it over to the Assignees of the Bankrupt's Estate: that in the mean Time they may prove £2831 : 4s: 5d. as the Balance of their Debt, after deducting £1190; and may vote in the Choice of Assignees; with Liberty, in case the specific Property to be sold should not produce £1190, to increase their Proof.

Sir *Samuel Romilly*, and Mr. *Hart*, in support of the Petition, said, the Order prayed, though it could not be obtained from the Commissioners, would be made almost of course by the *Lord Chancellor*.

Mr. *Leach*, and Mr. *Montague*, for the Assignees.

The Rule in Bankruptcy is, that a Creditor, holding a Pledge, shall not be permitted to prove, until that Pledge has been sold, or the Value of it otherwise ascertained (*a*). This Order is by no Means of course. It is true, a similar Order was made in the Case of *De Tastet* (*b*), but under very special Circumstances, having no Analogy to

(*a*) *Ex parte Nunn*, 1 *Rose*, 322.

(*b*) *Ex parte De Tastet*, *Ante*, 280.

 these.

1813. SMITH, *Ex parte.* these. To sanction such an Order the Security ought on the Face of it to be strictly unimpeachable: but this Assignment, comprising all the Property the Bankrupt had in the World, was an Act of Bankruptcy. This Order will prejudge that important Question, arising on a Deed open to Objection on another Ground, that it is a Security, not for the Instalment or Composition, but for the original Debt.

Sir *Samuel Romilly*, in Reply, contended, that the Petitioners were clearly entitled to a Sale of the Pledge, held by *Willock*, whom they had paid; and the Assignment could not affect the previous Deposit.

1813, *May* 18.

The Lord CHANCELLOR.

The general Nature of the Application, made by this Petition, is this. It represents the Petitioners as having a Lien upon Two Leases, some Plate and Fixtures, for their Debt: that is, for their general Debt; and proposes to put a Value upon those Articles; and to consider them as precisely in the same Situation as if sold previously to the second Meeting, and the Residue of their Debt thereby ascertained. The Question, whether they have a Lien for their general Debt, must be examined by a very accurate Attention to the Circumstances; and it is stated, that this Application could not be successfully made to the Commissioners; but can only be granted by the *Lord Chancellor*, acting upon his Discretion under particular Circumstances.

Though some Instances of such Orders have occurred, they are not very common; and upon Principle I think their Number is not to be too readily enlarged. The Ground, on which it has been hitherto held, that a Creditor having a Security, shall not be permitted to prove his Debt, until

until he gives up his Security, or by a previous Sale ascertains his Debt, is, that he cannot know, what he is to prove, until his Debt has been reduced by the Produce of the Security; and therefore in ordinary Cases that Object is obtained by a Sale; and the Court has not gone solely upon the Difficulty of ascertaining the Debt, but has also upon Policy had Regard to this Circumstance; that, when there is a fair Question as to the Validity of the Security, it is obvious, that the Creditor, having a Value put upon it, before it is determined, whether he has a Right to it, or not, places himself in a much better Situation with regard to his Contest with the general Creditors, than he would be in under the general Rule, prescribing a Sale.

For these Reasons I conceive it to be clearly within the Power of the Great Seal, exercising a sound Discretion, to make such an Order; and Instances have occurred, where such an Arrangement was obviously beneficial to the general Creditors, as well as the individual Creditor holding the Security; as in the Case of a Mortgagee of a *West India* Estate, or its Produce, at a Time very unfavorable for disposing of such Property, it would be no less for the Benefit of the general Creditors than of that particular Creditor, to have a Value put upon the Estate, or the Produce in his Hands, and by subsequent Arrangement carry it up to the utmost Advantage. That shews, that the Court ought to have this Discretion. So in *De Tastet's* Case *(a)* I had no Difficulty. His Claim was indisputable; unless it could be cut down entirely by the Answer, that was given to it; and bearing an inconsiderable Proportion to a most enormous Debt, I thought it reasonable, that he should have some Influence in the Choice of Assignees; controuling that, so as to prevent the Appointment of an Assignee less indifferent between him and the

(a) Ex parte De Tastet, ante, 280.

1815. SMITH, *Ex parte.*

the other Creditors than he ought to be. In each Case therefore the Court is bound to look with very nice Attention at the particular Circumstances.

Under the Circumstances, that appear upon this Petition, Property came to these Creditors of a greater Value than the Amount of their Debt at the Time of the Assignment. The general Assignment of all *Hervey's* Estate was a clear Act of Bankruptcy; and the Property, being left in his Possession and Disposal, will of course go to the general Creditors *(a)*. That Assignment being cut down by the Operation of the Law, the Petitioners contend, that with regard to the Two Leases and the Plate in the Hands of *Willock* they have a Lien; and that Transaction, and the subsequent Circumstances, viz. their treating the Leases in account in respect of their Value as those of the Bankrupt and themselves, as his Creditors, must be considered as undone; originating in an Agreement, that cannot be carried into Effect; and that they have a Right to contend, that they stand, as if this Assignment had not been made. I think, they have that Right: but then, the Assignment being cut down, they cannot apply the Lien to their general Debt; being entitled only to that Lien, which *Willock* had. Abstracting therefore from their general Debt so much as was due to *Willock*, they have a Right to prove the Residue without regard to the Lien: so much as the Lien does not extend to: but with regard to the Residue the Proof must be stayed, until the Value of the Lien has been settled, and they are in a Condition to prove in the ordinary Course.

An Order was pronounced; declaring, that the Petitioners have no Lien except for that Debt, with regard to

(a) Stat. 21 *Jam.* 1. c. 19, s. 11.

which

which they may stand in the Place of *Willock*; and, as to the remaining Part of the Debt, that they should go before the Commissioners, and prove in the ordinary Course.

1813.
SMITH,
Ex parte.

1813,
May 22.

MORRIS *v.* OWEN.

Order to amend the Bill, not served or drawn up, cannot prevent the Motion to dismiss for want of Prosecution.

A MOTION to dismiss the Bill for want of Prosecution was resisted on the Ground, that the Plaintiff had obtained an Order to amend Six Months ago; though it was not served, or even drawn up.

Mr. *Bell*, for the Defendant: Mr. *Sidebottom*, for the Plaintiff.

The Lord CHANCELLOR at first intimated, that the Course was a Motion, that the Plaintiff should draw up his Order, and amend within a Week; or that the Order to amend should be discharged: but, having consulted the Register *(a)*, said, that if a Plaintiff, having obtained an Order to amend for the Purpose of keeping his Bill in Court, did not get that Order drawn up and served, until the Defendant had a Right to move to dismiss, the Order under these Circumstances must be considered a Nullity; and cannot prevent the Dismission of the Bill.

(a) Mr. *Croft*.

CLOWES

1813, May 14, 17, 21.

CLOWES v. HIGGINSON.

Distinction between the Admission of parol Evidence to support, or resist, the specific Performance of a Contract for Land: admissible for the latter Purpose upon Mistake and Surprise as well as Fraud; not to vary, add to, or explain, the written Contract.

Upon the ambiguous Terms of a Contract, as including or excluding the Timber, the Purchaser's Bill for specific Performance dismissed; and having throughout insisted upon his Construction, he was not permitted to compel the Vendor to convey upon the Terms he originally offered.

AFTER the Decree, pronounced at the *Rolls* in the Cause of *Higginson* v. *Clowes* (a), dismissing the Bill, this Suit was instituted by the Purchaser, the Defendant in that Cause; praying a specific Performance of the Contract, according to his Construction; that is, including the Timber, except upon the Lots Four and Five; to which, as he represented, the separate Valuation was to be confined: the Defendants, the Vendors, insisting, that under the eighth Condition of Sale all the Timber was to be separately valued.

Mr. *Hart*, and Mr. *Bell*, for the Plaintiffs, opposed the Introduction of parol Evidence; insisting, upon the Authorities, cited in the former Cause between these Parties, that it cannot be admitted to vary, add to, or explain, a written Contract; as it may to shew Fraud or Surprise.

Sir *Samuel Romilly*, and Mr. *Heald*, for the Defendant.

Evidence may clearly be admitted in support of the Defence to a Suit in a Court of Equity for the specific Performance of a Contract against the plain Intention; where it can be clearly established, that the one did not understand, that he was selling what the other conceived that he was buying. In such a Case, existing *bonâ fide*, and established by clear Evidence, the Court would refuse to execute the Agreement; leaving the Party to Law.

(a) 15 *Ves.* 516.

The

1813.

CLOWES v. HIGGINSON.

The Object of this Evidence is to explain an Ambiguity on the Face of the Conditions of Sale; and its Nature is, that the Auctioneer before the Sale stated to the Company in the Presence of Persons, bidding for the Plaintiff, that the Timber on the different Lots was to be paid for at a Valuation; that several Persons would have bid considerably more, if they had not by that Explanation been led to conclude, that they should have a farther Sum to pay for the Timber.

The Case of *Gunnis* v. *Erhart* (a), respecting Evidence of Declarations by the Auctioneer against the printed Conditions, was not followed by any Decision until the Case of *Higginson* v. *Clowes*; and in *Drewe* v. *Warmington* (b) Lord *Alvanley*, with *Gunnis* v. *Erhart* before him, admitted Evidence to explain, and almost to contradict, the printed Particular; certainly not understanding himself as contradicting that Case; but clearly expressing his Opinion, that such Evidence ought to be received; and deciding upon it.

If however these Declarations cannot be received as Evidence to explain an Ambiguity, it cannot be refused as a Defence to a Bill for specific Performance of a Contract: a Suit, in which the Defendant may shew, not only what the Agreement was, but under what Circumstances it took place; that in this Instance the Sale, including the Timber, at the Price, that was bid, proceeded from Misapprehension, not only on his Part, but under which all Persons present laboured; influencing them to limit their Biddings: a Case therefore of extreme Hardship; sufficient of itself without Fraud to induce a Court of Equity to refuse its Aid to the Purchaser to obtain so great an Advantage. This Dis-

(a) 1 *Hen. Blacks.* 289. (b) At the *Rolls*, 24th *April*, 1800.

tinction

1813.
CLOWES v. HIGGINSON.

tinction between cancelling and specifically performing an Agreement, receiving parol Evidence in the one Case, to rebut an Equity, refusing it in the other, to alter, explain, or add to, the written Contract, was established in *Savage* v. *Taylor (a)*; and has been followed in many modern Cases: *Woollam* v. *Hearn (b)*, *Ramsbottom* v. *Gosden (c)*: was admitted by Lord *Redesdale* in *Clinan* v. *Cooke (d)*; and is particularly illustrated in *The Marquis of Townshend* v. *Stangroom (e)*.

The VICE-CHANCELLOR.

The Exclusion of parol Evidence, offered to explain, add to, or in some Way to vary, a written Contract, relative to Land, stands upon Two distinct Grounds: not simply as being in direct Opposition to the Statute of Frauds *(f)*: but also upon the general Rule of Evidence, independent of that Statute. The Writing must speak for itself; and can receive no Aid from extrinsic Evidence of this more loose and dissatisfactory Nature. That, which is the Rule of Law, prevails equally in Courts of Equity; which admit no different Rule of Evidence upon this Subject; and thus far the Rule is perfectly clear; rejecting parol Evidence offered by the Plaintiff to constitute, vary, or explain, a Contract in Writing concerning Land; of which he seeks the specific Performance in a Court of Equity. The Difficulty is, how far Evidence is admissible, offered as a Defence against a Bill, praying a specific Performance. Upon that there undoubtedly are many Cases, where the Evidence has been received; and, without enumerating the Authorities, it may clearly be admitted for that Purpose upon

(a) *For.* 234.
(b) 7 *Ves.* 211.
(c) *Ante*, 165.
(d) 1 *Sch.* and *Le Froy*, 2.
(e) 6 *Ves.* 328.
(f) Stat. 29 *Ch.* 2, c. 3.

a plain

1813.

CLOWES v. HIGGINSON.

Specific Performance discretionary.

a plain and obvious Principle; that a Court of Equity is not bound to interpose by specifically performing the Contract; and though the Subject and Import of the written Contract, are clear, so that there is no Necessity to resort to Evidence for its Construction, yet, if the Defendant can shew any Circumstances *dehors*, independent of the Writing, making it inequitable to interpose for the Purpose of a specific Performance, a Court of Equity, having satisfactory Information upon that Subject, will not interpose.

The Rule, admitting Evidence in those Cases, is intelligible and clear. It is admitted, not to vary an Agreement, as it is expressed open to no Objection, and therefore upon the Letter binding, but to shew Circumstances of Fraud; making it unconscientious in the Party, who so obtained it, to insist upon, and unjust in the Court to decree, the Performance.

Fraud is not the only Head, upon which parol Evidence may be received, and, if made out satisfactorily, a specific Performance may be refused. Upon clear Evidence of Mistake or Surprise, that the Parties did not understand each other, it is introduced, not to explain, or alter, the Agreement, but consistently with its Terms to shew Circumstances of Mistake or Surprise, making a specific Performance, as in the Case of Fraud, unjust; and therefore not conformable to the Principles, upon which a Court of Equity exercises this Jurisdiction. There is however considerable Difficulty in the Application of Evidence under this Head; calling for great Caution, especially upon Sales by Auction, least under this Idea of introducing Evidence of Mistake the Rule should be relaxed by letting it in to explain, alter, contradict, and in Effect get rid of, a written Agreement. In Sales by Auction the real Object of introducing Declarations by the Auctioneer or other Persons is to explain, alter, or contradict, the written Contract; in Effect

1813.
CLOWES
v.
HIGGINSON.

Effect to substitute another Contract; and, independent of Authority, I should be much disposed to reject such Declarations, as open to all the Mischief, against which the Statute was directed, and also violating the Rule of Law, which prevailed previously; whether offered by a Plaintiff, seeking a Performance, or by a Defendant, to get rid of the Contract: a Distinction, which it is difficult to adopt, where the Evidence is introduced to shew, that the Writing, purporting to be the Contract, is not the Contract; that there is no Contract between them, if, that, which is proved by parol, does not make a Part of it. That does not depend upon the Principle, on which a Defendant is permitted to shew Fraud, Mistake, or Surprise, collateral to, and independent of, the written Contract: the Object in the other Case being to get rid of the Contract by explaining it away.

I do not recollect any Instance, that Evidence, offered in that View, has been received: but there are Cases, in which it has been rejected. The Case of *Jenkinson* v. *Pepys* (a), which I well remember, was very hard upon the Vendor; who clearly intended, that the Plantation in the Nursery should be valued distinctly from the Timber, which the Defendant was to take with the Estate. It was pressed, that at the Auction a distinct Statement was made, that there was to be a separate Valuation of the Nursery; and that the Defendant, or his Agent, was present, and heard that Declaration: but the Opinion of the Court was clear, that Evidence of that Declaration could not be received; being offered to supply a Defect; to alter in some Respect the written Import of the Contract.

The same Decision has been made in other Cases. That, which comes nearest this, is *Ramsbottom* v. *Gosden*

(a) In the Court of *Exchequer*: stated 15 *Ves.* 521.

den

Vendor to be at the Expence of making out his Title.

den (a); in which the parol Evidence seems to have had the Effect in some Degree of altering the written Contract; which was silent as to the Expence of making out the Title: but according to the general Rule the Vendor without Stipulation to the contrary must bear the Expence of making out his own Title. If the Evidence there offered can fairly be brought under the Head of Mistake, the Defendant, who sold reluctantly, having uniformly intended, and given Instructions accordingly, that the Expence should be borne by the Purchaser, that does not infringe upon the Principle I have stated, that parol Evidence of Fraud, Mistake, or Surprise, may be received as a Ground of Defence against a specific Performance.

No Authority having decided, that Evidence can be received except upon one of those Grounds, these Declarations are offered, where the Parties have contracted in Writing upon a Subject, distinctly adverted to in their written Contract; which makes a Provision for it, whether explicit and satisfactory is not material: but, as here is no Fraud, Mistake, or Surprise, the Evidence of these Declarations must be rejected; as it was rejected in the other Cause between the same Parties by the *Master of the Rolls;* who certainly left the Question open as to these Defendants: but, my Opinion being, that this Evidence is offered to contradict, explain, or vary, the written Contract, and not for any of the Purposes I have stated, as forming Exceptions, the Evidence is equally inadmissible in this Case.

The Evidence having been rejected, the following Judgment was pronounced by the VICE-CHANCELLOR.

(a) *Ante*, 165.

1813.

CLOWES v. HIGGINSON.

The Bill in the other Cause between these Parties was dismissed without Costs: the *Master of the Rolls* certainly not deciding, what would be the Effect of a Bill for specific Performance, filed by the other Party, the Defendant in that Cause; but conceiving, that a specific Performance ought not to be decreed against him, having purchased under a Mistake, to be fairly collected from the Circumstances, disclosed by the written Contract, and appearing before the Court. The *Master of the Rolls* certainly puts no direct Construction on the Contract; observing upon the Difficulty, that attends any Construction of it; and not determining, that the Defendant's is preferable, concludes, that, admitting it to be erroneous, he should not be held bound to perform the Contract in the Plaintiff's Sense; leaving it not absolutely decided, which was the right Construction; and, even supposing the Plaintiff's the true one, if the Terms were so ambiguous as to lead the Defendant to a different Construction, who consequently purchased under a Mistake, he should not be compelled specifically to perform the Contract. The *Master of the Rolls* in forming that Conclusion adopts Lord *Thurlow's* Opinion in *Calverley* v. *Williams (a)*; and seems to think, the Consequence of such a Mistake would be, that in Reality there was no Agreement between hem; that, misunderstanding each other, the one proposing to buy one Thing, the other to sell another, a Contract, so founded in Mistake, cannot consistently with Justice be executed; as the Effect would be, that the one must pay £2000 more, or the other receive £2000 less, than he intended.

That Bill being dismissed, this Bill is filed by the Defendant in that Cause; desiring, that his Construction may be put upon the Agreement; which is resisted by the Ven-

(a) 1 *Ves.* jun. 210.

dors,

1813.

CLOWES v. HIGGINSON.

dors, standing on their Construction; according to which they never intended to sell the Timber. Here then is a Contract in Writing, differently construed by the Two Parties; and the Court has been unable to put any Construction upon it; coming merely to the Conclusion, that there was a Mistake; and the only Distinction between the Cases is, that now the Vendors are the Defendants; and the Mistake and Ambiguity is rather to be imputed to that Party, whose Agent framed the Particular. With that single Exception, that the one may be considered as not so much the Author of the Agreement, though it is signed by both, these Parties are in precisely the same Situation; and this Cause comes before the Court under the same Circumstances: a Bill for the specific Performance of an Agreement, founded in Mistake.

Different Interpretations have been put upon the eighth Article of this Particular. It has been represented as a mere Repetition of what is said before, as to the Timber on Lots 4 and 5: or that, if carried farther, it must be confined to Lot 2: the Seven preceding Articles riding over all the Lots; and the Question is, whether that Article applies to Lot 2 alone, to Lots 4 and 5 alone, or to all the Seven Lots. Applied to Lots 4 and 5, it is a mere Repetition of what had been already provided for; and there was no Use in adding that Condition with reference to those Lots. Was it then intended to apply to Lot 2 only? That derives considerable Argument from the preceding Part of the eighth Condition, applicable to that Lot exclusively, and from the special Provision for a separate Valuation of the Timber upon Lots 4 and 5: but is not very consistent with the Description of the Timber, which the Particular holds out as a Temptation to Purchasers as to Lot 2, as well as Lot 1. The Effect upon this Construction must be, that as to both those Lots, though the Purchaser is to have

1813.
Clowes
v.
Higginson.

all the Inducement to bid, that would be derived from the Timber, it is to be the Subject of separate Valuation.

Is this Condition then to be applied generally to all the Lots? Upon that Hypothesis it is open to the Observation, that in some Degree it infringes upon the plain Import of all the preceding Conditions, taken together: a separate Valuation being expressed only as to Two Lots. It is extremely difficult to put any Construction upon an Instrument, so loosely and imperfectly expressed in every Part; and, not meaning to say decisively what is the true Construction, if I am forced to intimate an Opinion among all these Difficulties, I incline, as open to the least Objection, to understand the Vendor as stating, with regard to all the Lots, that the Timber shall be separately valued. Describing the Timber on Lots 4 and 5, a separate Valuation of which is expressly directed, as to all the rest he gives a general Direction, that the Purchaser, meaning the Purchasers of the several Lots, shall take the Timber at a Valuation. What Timber? Can he be conceived to mean the Six Pieces of Elm and Ash; with so much Anxiety repeating that Direction as to those trifling Articles, before expressly provided for? He must be supposed to have some farther Meaning; which, I think, was, that the Purchaser of each Lot shall take the Timber at a fair Valuation, not confined to any Lot specifically; which is not inconsistent with the express Direction as to the Lots 4 and 5.

I do not say decisively, that this is the Construction: nor can I say, that the Vendor did not mean to reserve a subsequent Valuation of the Timber: but the Expression is so ambiguous, that it might mislead the Purchaser. What then is the Result of a Contract, so ambiguous as to lead both Parties to a mistaken Construction, without Fraud or Misconduct in either? A Court of Equity by

enforcing

enforcing such a Contract would do gross Injustice. Why is not Mistake, upon which the *Master of the Rolls* let off the Purchaser, equally to let off the Vendor? By enforcing the Contract I must deprive the one of his Estate for £2000 less, or make the other pay £2000 more, than each intended. I do not mean, that any Degree of Doubt is to prevent the Court from putting the best Construction it can upon a Contract: but, if there is such a Degree of Doubt and Ambiguity, that the Court can come to no other Conclusion, than that the Parties did not rightly understand, what the one meant to buy, and the other to sell, and upon that Ground of Mistake the one has been let off, that is a Ground for refusing in a Court of Equity to perform a Contract, the Effect of which must be so much Injustice to one Party or the other. That is the Ground, upon which the *Lord Chancellor* proceeded in *The Marquis of Townshend* v. *Stangroom (a)*, and Lord *Thurlow* in *Calverley* v. *Williams (b)* held, that, one Party intending to buy what the other never intended to sell, there was no Contract. This Case affording the same Ground of Mistake, upon which the other Cause was decided at the *Rolls*, and no Circumstance of Difference, except that the other Party is become the Plaintiff, cannot be distinguished; and must meet the same Fate: the Bill must be dismissed: but in such a Case of innocent Mistake, neither Party meaning to take an Advantage, I will not give Costs.

1813.
CLOWES
v.
HIGGINSON.

1813.
May 21.

The Plaintiff proposed to take the Estate according to the Defendant's Construction; paying for the Timber upon a separate Valuation. This was objected to by the Defendants, as unreasonable after all this Litigation; and the Bill not being framed for that Purpose.

(a) 6 *Ves.* 328. (b) 1 *Ves.* jun. 210.

1813. Clowes v. Higginson.

Mr. *Hart*, and Mr. *Bell*, for the Plaintiff, referred to *Woollam* v. *Hearn* (a); and relied on the Passage in the Bill, "hereby offering to perform the said Agreement "according to the true Intent and Meaning thereof," and the Answer, submitting to execute a Conveyance to the Plaintiff on Condition, that he would take the Timber at a Valuation; observing that a Plaintiff, having stated one Construction in his Bill, may adopt another at the Bar; and have Relief accordingly: *Lindsay* v. *Lynch* (b).

Sir *Samuel Romilly*, in Reply.

The Offer by the Bill does not bind the Plaintiff to perform the Agreement according to whatever Construction the Court shall put upon it; but adopts a particular Construction; and, praying certainly that it may be performed according to the true Construction, must be understood to mean that, which he has before stated as his Construction. The Bill has no alternative Words: nor could that be the Intention. This Election is most unconscientiously insisted on against the Will of the Defendants at the Distance of Five Years, whatever Change may have taken place in the Value of the Estate: the Plaintiff first contending through all this Litigation, that he was to have this Purchase for £2000 less than the Defendant's Price; yet feeling the Bargain so very advantageous, that he is now willing to pay £2000 more.

The Vice-Chancellor.

I feel great Difficulty in compelling the Defendants to convey upon the Terms now proposed. I do not understand the Bill, taken altogether, as meaning that the Plaintiff is ready to perform the Agreement according to any Construction the Court may put upon it; throwing

(a) 7 *Ves.* 211. (b) 2 *Sch. & Lef.* 1.

the

the Construction upon the Court. The Plaintiff has uniformly contended, both at the *Rolls* and here, from the Commencement of these Suits to the last Decree, that he never made, or intended, any Agreement but to take the Estate with the Timber upon it, with the Exception of Lots 4 and 5; and as Evidence of that he adduces this Paper; to make out his Construction. This is not like the Case, to which it has been compared; a Plaintiff calling upon the Court to construe and execute a Will according to the true Construction; suggesting that, which he conceives to be so: but this Plaintiff merely submits to perform the Agreement, as he intended it; according to the true Intention, as he represents it; that is, to have the Timber with the Estate; never meaning to pay for the Timber separately. The Defendants insist on the contrary Construction, as that, which was intended by them. Though there is but one Paper referred to, containing the Particular, Conditions, and Declarations, in Truth there are Two distinct and opposite Agreements, one insisted on by each Party, as evidenced by that Paper. the one including, the other excluding, the Timber. In such a Case of mutual Mistake, the one not intending to sell, what the other meant to buy, the Court, feeling the Injustice of giving to either a Performance upon Terms, to which the other never agreed, has come to the Conclusion, that there is no Contract between them; that they did not rightly understand each other; and therefore it is not possible without Consent to compel either to take what the other has offered. This Plaintiff having uniformly up to the Hearing insisted on his Construction, as the only Contract between them, not offering to take up the other Construction, which the Defendant was at one Time willing to have performed, it is perfectly different from calling upon the Court to declare the true Construction, and submitting to perform according to that. The Court, having in both Instances considered the Transaction as too ambiguous to form the Foundation of a

1813.
CLOWES
v.
HIGGINSON.

Contract, cannot now take this Passage in the Answer as the Ground of a Decree for specific Performance against the Will of the Defendants; and compel them to accept Terms, which they once offered, but to which the other Party would not then consent.

The Bill must therefore stand dismissed without Costs.

1813,
May 26.

HODLE *v.* HEALEY.

Demurrer to a Bill for Redemption of a Mortgage upon Twenty Years Possession by the Mortgagee over-ruled, upon Allegation of Admission of the Mortgage Title within that Period.

THE Bill stated, that in the Year 1777 the Defendant having contracted with *Sarah Smith* and *Elizabeth Smith*, an Infant, by her Guardian, for the Purchase of the Equity of Redemption of Two Houses, then in Mortgage for £300 and £200, entered into Possession, paid off the Mortgages, and took Assignments; but did not pay the Purchase-money of the Equity of Redemption; alledging Defects in the Title. In 1782 *Elizabeth Smith* having married *Hodle*, they with *Sarah Smith* filed a Bill against the Defendant for a specific Performance. On the 24th of *January*, 1784, the Parties to that Suit signed an Agreement, that the Plaintiffs should cancel the original Agreement, and dismiss their Bill with Costs, to be allowed the Defendant in his Account of the Rents and Profits, if the legal and equitable Right then was in, or should afterwards come to, the Plaintiffs in that Suit; and that until Payment of such Costs, &c. there should be no Redemption.

The Bill, farther stating, that the Defendant had ever since continued in Possession as Mortgagee without Account,

1813.
HODLE
v.
HEALEY.

count, though Applications had at Times been made to him, set forth a Letter in Answer to one of those Applications, made in *June*, 1804, by the Plaintiff, whose Wife was dead, leaving One Daughter only: the Defendant in that Letter referring particularly to the Agreement of *January*, 1784; and generally proposing to advise upon the Interest of the Plaintiff's Daughter. The Bill then alledging, that the Rents had long since liquidated the Incumbrances, prayed an Account and Reconveyance.

To this Bill the Defendant put in a general Demurrer for want of Equity.

Sir *Samuel Romilly*, and Mr. *Barber*, in support of the Demurrer, contending that, the Defendant having been upwards of Twenty Years in Possession without Account, the Plaintiffs were not entitled to redeem, and that this Objection may be taken by Demurrer *(a)*, cited the following Authorities:—*Eure* v. *White* *(b)*, *Knowles* v. *Spence* *(c)*, *St. John* v. *Turner* *(d)*, *Isham* v. *Cole* *(e)*, *Jenner* v. *Tracey* and *Belch* v. *Harvey* *(f)*, *Anon. Ca.* *(g)*, *Aggas* v. *Pickerell* *(h)*, *Pearson* v. *Pulley* *(i)*, *Hartpole* v. ——— *(k)*, *Conway* v. *Shrimpton* *(l)*, and ——— v. *Lord*

(a) See Mr. *Cox*'s Note to *Cook* v. *Arnham*, 3 *P. Wms.* 287; and *Aggas* v. *Pickerell*, 3 *Atk.* 225; Lord *Redesdale*'s *Treat. Plead.* 254, 255, and the Authorities referred to. *Edsell* v. *Buchanan*, 2 *Ves.* jun. 85.

(b) 2 *Vent.* 340. 1 *Eq. Ca. Ab.* 313.

(c) 1 *Eq. Ca. Ab.* 315.

(d) 2 *Vern.* 418.

(e) 1 *Ch. Rep.* 68.

(f) In Note to *Cook* v. *Arnham*, 3 *P. Wms.* 287.

(g) 3 *Atk.* 313.

(h) 3 *Atk.* 225.

(i) 1 *Ch. Ca.* 102.

(k) 4 *Bro. P. C.* 369.

(l) 15 *Vin. Ab.* p. 468, pl. 9.

Annesley

1813. HODLE v. HEALEY.

Annesley (a), *Perry* v. *Marston* (b), Lord *Redesdale's Treatise* (c), and *Foster* v. *Hodgson* (d).

Mr. *Hart*, and Mr. *Cook*, for the Plaintiff.

Admitting, that this Court acts by Analogy to the Statute of Limitations (e), and that a Demurrer is as available as a Plea to take Advantage of such a Length of Possession, this Case is not within the general Rule, precluding Redemption: the Defendant having within Twenty Years actually treated the Property as mortgaged. A Plea is, however, evidently the more proper Course; and, as Issue can be taken by the Plaintiff on the Facts set up, ought to be encouraged. This is a Demurrer for want of Equity simply: but the Analogy to the Statute of Limitations does not proceed on that Ground; but opposes a statutory Bar to the Relief. This Defendant in 1804, clearly acknowledged himself a Mortgagee. Demands were made by the Mortgagors even subsequent to that Period; and though at Law the Demand must be by Action, to prevent the Effect of the Statute, in Equity the mere Demand is equivalent.

The VICE-CHANCELLOR.

There is no Doubt, that in 1784 the Estate, of which this Bill seeks a Redemption, belonging to *Sarah* and *Elizabeth Smith*, was redeemable. The Question is, whether upon the Facts, stated in the Bill, the Plaintiff is now entitled to redeem. Upon the general Principle there can be no Dispute, that a Mortgagor, coming to redeem

(a) 2 *Sch.* and *Lef.* 630, 632.

(b) _ *Bro. C. C.* 397.

(c) Page 213.

(d) Argued after last *Trinity* Term.

(e) 21 *Jac.* 1. c. 16.

after

after Twenty Years Possession by the Mortgagee, without shewing some Act, in which it was treated as a Mortgage within that Period, is too late. Does this Bill then state any Facts, taking this Case out of that general Principle, adopted by Analogy to the Statute of Limitations, and giving the Right to Redemption after the Lapse of Twenty-eight Years? With regard to the Prayer of Discovery, if not entitled to Relief the Plaintiff cannot have the Discovery. By the Import of the Agreement of 1784, the Defendant unquestionably was recognized as a mere Mortgagee. It is said, that Agreement *per se*, followed by no Act, is an executory Contract, establishing his Character of Mortgagee, and making him liable to account: but the Effect of that cannot be more than an actual Mortgage. The Agreement to account gives it a Date at that Time: but if for Twenty Years afterwards he has done no Act as Mortgagee, he is entitled to the Benefit of the Analogy to the Statute. *Elizabeth Smith* was under the Disability of Coverture; and there must have been the Disability of Infancy, until both, being Daughters, came of Age: a considerable Period therefore must have elapsed, before their Claim could be barred.

1813.

HODLE v. HEALEY.

Length of Time adopted in Equity by Analogy to the Statute of Limitations: Plaintiff, not entitled to Relief, cannot have Discovery.

There is no Doubt, that Advantage may be taken of this Objection by Demurrer; if the Bill so states the Case, that there is nothing to interfere with the Effect of the Lapse of Time, to the Benefit of which the Defendant is entitled: but it is difficult to suppose such a Case; the Bill not alledging something to take it out of the Analogy to the Statute. The Question is, whether this Bill does state any thing, taking it out of that Analogy; and amounting to a Recognition of the Character of Mortgagee: it states, that in 1784 he did in fact hold as Mortgagee, and was accountable as such; that the Plaintiffs had the Equity of Redemption; and made frequent Applica-

tions

1813.

HODLE v. HEALEY.

Mere Demand, without Process or Acknowledgment, not sufficient against the Statute of Limitations.

tions for an Account: but the mere Demand of an Account is not alone sufficient to prevent the Effect of the Length of Time. It is represented as equivalent to actual Entry; which is sufficient to keep alive the Right of a Person disseised: but a mere Demand of a Debt, without Process, or any Acknowledgment, is not sufficient to take the Case out of the Statute of Limitations. Here is, however, farther, the Correspondence in 1799, 1801, and this Letter in 1804; by which he refers expressly to the Agreement of *January*, 1784; admitting clearly, that he was at that Time a Mortgagee; and holding out the Terms of Redemption. Is not that a sufficient Recognition of his Character of Mortgagee; claiming the Benefit of it himself; and does it not preclude his setting up any different Title from that under the Agreement of 1784; by which they clearly stand in the Relation of Mortgagor and Mortgagee?

It is said, that Lord *Thurlow*'s Opinion was, that a mere Declaration of the Party, that he is Mortgagee, is not sufficient, unless some Act is done, to keep alive the Character; and the Case of *Perry* v. *Marston (a)* is cited: but, I do not collect that from Lord *Thurlow*'s Reasoning. The Question there was, whether a verbal Declaration by the Mortgagee after a Suit commenced was to be opposed to his Answer, positively setting up a distinct and separate Title. Lord *Kenyon*'s Opinion was, that even under such Circumstances his mere Declaration was sufficient: but Lord *Thurlow*, so far from concurring in that, says directly the Reverse: " I take it, that a Man, taking Notice by a " Will, or any other deliberate Act, wherein he recites, " that he is Mortgagee, either of those Circumstances will " take the Case out of the Rule, that a Mortgagor shall " not redeem after Twenty Years;" and in the Conclusion seems to lay down the Principle, that if a Party will admit,

(a) 2 Bro. C. C. 397.

that

that he is only a Mortgagee, he is bound by such Admission; and cannot resist Redemption.

1813.
HODLE
v.
HEALEY.

The single Question before me is, whether the Defendant, in 1804 referring to the Agreement of 1784, does not thereby admit; that he was in Possession solely in the Character of Mortgagee upon the Footing of that Agreement. Upon that Ground I think, there is sufficient alledged in this Bill to sustain the Right of Redemption; and therefore this Demurrer must be over-ruled.

1813,
May 21.

GRIFFITH *v.* WOOD.

After Demurrer over-ruled Order of course for a Month to plead or answer.

A DEMURRER having been over-ruled in this Cause, a Motion was made, as of course, for a Month's Time to plead or answer.

The Register (a) objected, that the Order for Time could not be taken except in the common Way, and upon the usual Allegation.

Mr. *Cooke,* in support of the Motion.

This Motion is made in the common Way, except in not praying Time to demur: the Defendant having already taken that Course. There is no Rule, that an Order for Time cannot be had after a Demurrer over-ruled. The general Rule certainly is not to permit more than one Dilatory: but a Plea is considered as an Answer. If the Defendant is not entitled to Time, as of course, the Con-

(a) Mr. *Walker.*

sequence

1813. GRIFFITH v. WOOD.

sequence must be, that after the Demurrer allowed he would be instantly in Contempt, and subject to Attachment; and, if he is advised, that he is not bound to answer, the Effect will be most unjust. No Objection to this Motion can be stated from the Reports or Books of Practice.

The VICE-CHANCELLOR made the Order.

1813, *May* 21.

EDMUNDS *v.* BIRD.

Injunction, restraining an Executor, claiming under the Will, and also by a Gift from the Testatrix, in her Life, from selling, upon Affidavit of undue Influence, &c.

A MOTION was made for an Injunction to restrain an Executor from converting Furniture and other specific Property into Money, upon strong Affidavits of his having obtained compleat Influence over the Testatrix, at an advanced Age; that from the Time she became acquainted with him she fell into the Habit of excessive Intoxication; that he prejudiced her against the Plaintiff and all her other Connections; and prevailed upon her to make a Will; also claiming the Property in his Possession as a Gift from the Testatrix in her Life: the Plaintiff insisting, that she was equally incompetent to either Act.

Mr. *Cooke*, in support of the Motion.

An Administration *pendente lite* might have been obtained in the Ecclesiastical Court: but that would not secure the Property, of which the Defendant has got Possession; and is about to sell; and the fair Presumption from the Circumstances, disclosed by this Affidavit, is, that this Property, if converted into Money, will be irrecoverable.

able. The Case of *King* v. *King (a)* is a strong Authority for the Jurisdiction; and Lord *Erskine's* Expression in *Richards* v. *Chave (b)*, that this Court ought never to interfere, where the Spiritual Court can grant an Administration *pendente lite*, must be taken with the previous Qualification, that the Property was not proved to be in Danger. The Defendant cannot sustain much Inconvenience; as, if he can make out a Case, or by Security satisfy the Court, that the Effects will be forthcoming, he may put in an Answer; and get rid of the Injunction.

1813.
EDMUNDS v. BIRD.

The VICE-CHANCELLOR.

A strong Ground for the Motion is, that an Administration *pendente lite* would not help the Plaintiff: the Defendant insisting upon a Title by Gift *inter vivos*, which, as well as the Will, is impeached. That Ground, I think, will sustain the Motion.

The Order was made.

(a) 6 *Ves.* 172. (b) 12 *Ves.* 462.

1813, *May* 25.

KENDALL, *Ex parte*.

Bankrupt, not served with a Petition to stay his Certificate, on which an Attendance had been ordered, entitled to his Certificate; and not bound by taking Copies of the Affidavits.

THE usual Order for Attendance had been made upon a Petition to stay a Bankrupt's Certificate: but the Bankrupt was not served.

The

1813.
KENDALL, *Ex parte.*

The Lord CHANCELLOR.

This Certificate must be allowed. The Bankrupt, not having been served with Notice of the Petition, upon which an Attendance was ordered on the next Day of Petitions, had a Right to call for his Certificate on the Morning of that Day; and, though he afterwards took Office Copies of the Affidavits, I will not bind a Bankrupt to his Prejudice by that Act, when it was not necessary for him to take any Notice whatsoever of the Petition; as it must be understood, that if a Bankrupt is not served with the Petition to stay his Certificate, upon which an Attendance is ordered on the next Day of Petitions, the Certificate shall go of course

---

1813,
May 26.

HODDER *v.* RUFFIN.

Purchaser discharged on Motion upon Affidavit of Imprisonment for Debt and Insolvency.

THE Plaintiffs moved to discharge a Purchaser and that the Estate may be re-sold with the Approbation of the Master; stating by Affidavit, that since the Confirmation of the Report the Purchaser was confined for Debt in the *King's Bench* Prison; and, as the Deponent has been informed and believes, is become wholly insolvent, and incapable of compleating the Purchase. The Purchaser was served; but did not appear.

Mr. *Bell,* in support of the Motion, and Mr. *Richards* (*Amicus Curiæ*), stated, that the Practice in order to discharge a Purchaser formerly was different, but the recent Practice authorised this summary Application.

The VICE-CHANCELLOR observing, that the Practice was convenient, made the Order.

WHITWORTH

WHITWORTH *v.* DAVIS.

1813, May 19, 21.

Demurrer by a Bankrupt to a Bill joining him with his Assignees in Charges and Prayer for Relief; viz. the specific Performance of a Contract, previous to his Bankruptcy, allowed.

Distinction upon Fraud.

Whether a Bankrupt can be made a Party merely for Discovery, and to maintain an Injunction, *Quære.*

JAMES Paine, having contracted for a Purchase from the Defendant *Graham*, agreed in *August*, 1810, to sell Part of the Property contracted for, to *James Davis;* who in *August* 1811 agreed to sell the Subject of his Purchase to the Plaintiff. These different Contracts remaining unexecuted, *Davis* in *April*, 1812, became Bankrupt. The Bill, filed against *Graham*, *Paine*, the Assignees under the Commission of Bankruptcy, and against *Davis*, the Bankrupt, prayed, that the Agreement between *Davis* and the Plaintiff, might be specifically performed, and that all proper Parties might concur, and an Injunction to restrain the Assignees from proceeding for Rent against the Plaintiff in Possession. To this Bill the Bankrupt *Davis* demurred.

Mr. *Owen*, in support of the Demurrer.

The Bankrupt has been improperly made a Party, his Interest having passed by the Assignment; and the Assignees being Parties. In ordinary Cases a Bankrupt cannot be made a Party; and there are no special Circumstances, justifying a Departure from the general Rule. No Relief is prayed, nor any Case made, against him. He is to be regarded as a mere Witness; whom the Plaintiff may examine, though the Assignees cannot. The Case of *Fenton* v. *Hughes* (a) states the Principle, that a mere Witness shall not be made a Defendant; and this Bankrupt does not fall within any of the Exceptions to the general Rule, mentioned in that Case, as Agent to sell, Auctioneer, Secretary or Book-keeper to a Corporation.

(a) 7 *Ves.* 287.

1813. WHITWORTH v. DAVIS.

Sir *Samuel Romilly*, and Mr. *Meggison*, for the Plaintiff, citing the Cases of *Drake* v. *The Mayor of Exeter* (a), and *Moyses* v. *Little* (b), as Authorities, that the Interest in the Bankrupt's Contract had not passed to his Assignees, contended, that, admitting the Bankrupt has no Interest, the Plaintiff is entitled to bring him before the Court, and have his Answer; as, if necessary to obtain an Injunction against Assignees the Plaintiff may make the Bankrupt a Party; and the Court will not on the Answer of the Assignees, that they know nothing of the Matter, dissolve the Injunction; which is retained until the Bankrupt's Answer comes in, which may be read against the Assignees in support of the Injunction, though perhaps not at the Hearing. In *Glassford* v. *Jaffrey*, which lately occurred in the *Exchequer*, the Bankrupt's Answer was read against his Assignees.

Mr. *Hart*, and Mr. *Cooke* (*Amici Curiæ*), said, the *Lord Chancellor* had intimated, that it might be necessary to make a Bankrupt a Party, in order to enable the Plaintiff to frame the Interrogatories, on which he was to be examined as a Witness; and referred, for the general Doctrine, to *Le Texier* v. *The Margravine of Anspach* (c).

Mr. *Owen*, in Reply.

Few Propositions would lead to greater Hardship than that a Bankrupt should be made a Party in such a Suit as this; having no Property even to pay for the Answer he is called upon to put in; though a Bill of Discovery may admit the Distinction, that he would be entitled to his Costs. Fraud is the single Exception, upon which a Bankrupt, or any other Person, who is a mere Witness, can be

(a) 1 *Ch. Ca.* 71. 1 *Nels. Ch. Rep.* 102. 1 *Eq. Ca. Ab.* 53, pl. 1.

(b) 2 *Vern.* 194.

(c) 15 *Ves.* 159.

made

made a Party. The Reason, that without this Discovery by the Bankrupt the Plaintiff will not know how to point his Case against the Assignees cannot apply in this Instance. In *Glassford* v. *Jaffrey* the Assignees, referring to the Answer of the Bankrupt, incorporated it with their own.

1813.
WHITWORTH v. DAVIS.

The VICE-CHANCELLOR.

May 26.

Upon the Argument of this Demurrer it was contended in support of the Bill, that *Davis*, the Bankrupt, was properly made a Party in respect of the Interest he had in the Subject: the Right to have the Contract performed, or to resist it, being a Subject, that did not devolve upon the Assignees; and Two Cases were referred to: *Moyses* v. *Little (a)*, and *Drake* v. *The Mayor of Exeter (b)*, to a certain Degree warranting the Proposition, that the Interest, which the Bankrupt had in a Contract, does not devolve upon his Assignees. If that Proposition can be maintained, this Bill is properly framed; the Bankrupt being mixed with the other Defendants in the Charges of the Bill, and Relief prayed against him as well as the others; that he may join in the Conveyance. That Proposition however appears to me not to be tenable. It proves considerably too much; as, if the equitable Interest in the Contract, does not devolve upon the Assignees, they ought not to have been made Parties; but the Bankrupt alone. That is contrary to all Authority; and was relinquished by Sir *Samuel Romilly* upon the clear Ground, that all legal and equitable Interest in the Property devolves upon the Assignees; that they are competent to sustain the Case in point of Interest; and therefore the Bankrupt is not a necessary Party. That is expressly stated in *De Golls* v. *Ward (c)* in the Note to *Wych* v. *Meal*.

Effect of Assignment under a Commission of Bankruptcy; passing all legal and equitable Interest.

(a) 2 *Vern.* 194.
(b) 1 *Ch. Ca.* 71. 1 *Nels.* 102. 1 *Eq. Ca. Ab.* 53, pl. 1.
(c) 3 *P. Will.* 311, *n.* 1.

The

1813. WHITWORTH v. DAVIS.

The other Ground, alleged in support of the Bill, is more questionable: whether the Bankrupt is not a proper Party for the Purpose of Discovery; and to sustain the Injunction, if his Answer affords Ground for it. Sir *Samuel Romilly* stated the Practice to be to make the Bankrupt a Party, with the View to read his Answer for the Purpose of sustaining the Injunction against his Assignees; and that receives some Authority from what is stated by Lord *Redesdale (a)*; that "a Bankrupt, made a Party "to a Bill against his Assignees touching his Estate, may "demur to the Relief, all his Interest being transferred to "his Assignees: but it seems to have been generally "understood, that, if any Discovery is sought of his Acts, "before he became a Bankrupt, he must answer to that "Part of the Bill for the Sake of Discovery; and, to "assist the Plaintiff in obtaining Proof; though his "Answer cannot be read against his Assignees; and other- "wise the Bankruptcy might entirely defeat Justice."

No Authority is cited for that: but Lord *Redesdale*'s Judgment is confirmed by the Intimation from the Bar of the current Opinion, that the Bankrupt may for the Purpose of Discovery be a Party in a Bill for an Injunction. I have not been able to find a Case, that supports that Opinion: but the Knowledge, that it is the received Practice, is sufficient to induce me not lightly to disturb it. There is certainly great Convenience in this; as in such a Case all the Transaction may be known to the Bankrupt alone; and the Party, seeking Relief, would be entirely deprived of it, as far as regards the Injunction, if a Discovery cannot be obtained from the only Party, having a Knowledge of the Transaction. There is however a Difficulty consistently with the Rule and Principle, to conceive how the Bankrupt's Answer can be read against his Assig-

(a) Lord *Redes. Tr. Ch. Pl.* 142-3.

nees

nees even for the Purpose of an Injunction, when clearly it could not be read against them at the Hearing.

The Case of *Glassford* v. *Jaffrey*, in the Court of *Exchequer*, which was cited as an Authority for reading the Bankrupt's Answer against his Assignees, affords no Assistance upon this Point; all the Assignees having put in distinct Answers, craving Leave to refer to the Answer of the Bankrupt, and the Schedules to that Answer; not having any Knowledge themselves upon the Subject. In that Instance therefore the Bankrupt's Answer was properly read against them.

There is one direct Authority, that the Bankrupt ought not to be made a Party even for the Purpose of Discovery: *Griffin* v. *Archer* (*a*). The Note is short: but I have inquired from the Judges, who decided that Case; and find the Report of the Decision, that the Demurrer was allowed, is correct. The Case of *King* v. *Martin* (*b*) does not bear upon the Subject: the Opinion of the Court being, that there might be Relief against the Bankrupt upon the Fraud; who is stated expressly to be a material Party, against whom a Decree might be made. There was another late Case, *Cooke* v. *Marsh* (*c*), in which I understand from general Information only, that the Demurrer was allowed: but I do not find distinctly, that it was the Demurrer of the Bankrupt.

The Case standing thus upon the Authorities, how is it on Principle? The Case of *Fenton* v. *Hughes* (*d*) lays down a broad Principle, that would exclude this Bankrupt

(*a*) 2 *Anst.* 478. cited *ante*, 2 *Ves.* jun. 643.

(*b*) 2 *Ves.* jun. 641.

(*c*) In *Chancery*, *Trin.* 1811.

(*d*) 7 *Ves.* 287.

1813.
WHITWORTH v. DAVIS.

Rule, that a mere Witness, having no Interest, ought not to be a Party.
Exceptions to that Rule.

as a Party; viz. that a Person, who has no Interest, and is a mere Witness, against whom there could be no Relief, ought not to be a Party. A Bankrupt stands in that Situation: a competent Witness, having no Interest, against whom therefore no Relief can be had at the Hearing; he falls precisely within that general Rule; and the Cases of Exception, stated by the *Lord Chancellor*, do not comprehend him. So in the Case of *Le Texier* v. *The Margavine of Anspach* (a), where the general Rule is laid down, the Case of a Bankrupt is not stated as constituting an Exception. The Principle is certainly against making him a Party; and the Instance of Exception, put by the *Lord Chancellor* in *Fenton* v. *Hughes*, is mentioned, not with Approbation, but as standing upon Authority only; having been introduced by Lord *Talbot* not upon a very satisfactory Principle.

The Conclusion is therefore, that the Bankrupt is within the Principle; and is not one of the Persons included in the Exceptions. Therefore upon Principle and the direct Authority of the Court of *Exchequer*, opposed by no Decision, this Bankrupt ought not to be made a Party even for the Purpose of Discovery. It is not however necessary to decide that in this Case; and, merely stating the Result of my Inquiries, I desire not to be understood as opposing my Opinion, though formed upon a Consideration of the Principle and Authorities, to any current Opinion, prevailing as to the Practice: this Bill being framed with the View of considering the Bankrupt as having such an Interest, that Relief may be had against him; involving him in the Charges with the other Defendants; and praying Relief generally against him. Considered as a proper Party, against whom the Prayer of Relief ultimately may be sustained, he could not move for his Costs,

(a) 15 *Ves.* 159.

as

as a Defendant, against whom Discovery only is prayed, and no Decree can be made. It is then perfectly clear, that, Relief being prayed against a Defendant, who can be a Party only for the Purpose of Discovery, he may demur. Upon that Ground, that Relief is prayed against this Bankrupt, when at all Events a Discovery only can be sought against him, it seems to me, that, without determining the general Question, this Demurrer may be sustained.

1813. WHITWORTH v. DAVIS.

BARING v. NASH.

1813, May 26. 31.

Bill for Partition by Lessee for Years.

Demurrer, for Cause, that the Bill stated the Defendant's Estate not with sufficient Certainty, viz. that he "is seised "in Fee, or "otherwise "well entitled "to," and *ore tenus*, that the Reversioner was not a Party, overruled.

THE Bill stated, that under an Indenture of Assignment the Plaintiff is possessed of, or well entitled for the Remainder of a Term of Five Hundred Years, commencing in 1740, to one undivided Tenth Part of certain Premises; that the Defendant *Nash*, is "seised "in Fee-simple or otherwise well entitled to Seven other "Tenth Parts" of the same Property, and that the Defendant *Graves* in his own Right, or in the Right of the Defendant *Caroline* his Wife is "seised in Fee-simple of "or otherwise well entitled to the Two other or remaining Tenth Parts." The Bill prayed a Partition.

To this Bill the Defendant *Nash* demurred on the Ground, that it was not stated with sufficient Certainty, what Estate this Defendant had in the Seven undivided Tenth Parts of the Property, which it was in the Bill stated this Defendant is seised in Fee-simple of or otherwise entitled to.

1813. Baring v. Nash.

Another Ground of Demurrer was taken *ore tenus*; that all Persons interested were not brought before the Court.

Sir *Samuel Romilly*, and Mr. *Meggison*, in support of the Demurrer, contended, that there was no Instance of a Decree for Partition against Persons, having only a partial Interest, those, having the permanent Interest, not being before the Court; observing, that the Advantage of a Partition in Equity over that at Law consisted in all the Parties being before the Court and bound.

Mr. *Trollope*, for the Plaintiff.

The Plaintiff could not state the Defendant's Interest in any other Manner. It would have been sufficient, had he suggested a pretended Claim by the Defendant; and called for a Discovery of it: or there could be no such Thing as Partition. An Estate in Fee is expressly alledged; and the Words "or otherwise entitled" are merely formal.

As to making the Reversioner a Party, it was not only unnecessary, but he might have demurred. This Bill merely affects the present Possession; not touching the Reversioner's Interest. Before the Stat. of *Will.* and *Mary* (a) there was no Partition here, but between Tenants in Fee; but ever since it has been made between Tenants for Life.

The Vice-Chancellor.

May 31. As to the first Ground of Demurrer, that, which appears

(a) 8 & 9 *W.* & *M.* c. 31. On Partition in general, see Mr. *Hargrave's* Note, 2 *Co. Litt.* 169, a, and Authorities there cited.

pears upon the Record, that the Interest of the Defendant is not stated with sufficient Precision, the Bill stating, that he is seised in Fee-simple of, or otherwise well entitled to, Seven other undivided Tenth Parts, my Opinion is, that this Cause of Demurrer is not well founded. The Plaintiff, who has, as he was bound to do, stated his own Interest with Precision, cannot be supposed so cognisant of the Nature of the Defendant's Interest; which he states therefore in this Way; and calls for a Discovery of the Extent of it; and prays a Partition.

The other Ground of Demurrer, alledged *ore tenus*, brings forward a much more important Question, whether a Bill for Partition can be maintained by a Person, having only a limited Interest, by a Term of Five Hundred Years in One Tenth Part; and the Owner of the Inheritance of that Tenth not being a Party; as the Owners of the Inheritance of the other Nine Parts are. It is said, that without the Owner of the Inheritance of this Tenth Part, in which the Defendant has the Term, the Court has not before it all the Parties interested in the Subject; and therefore cannot make an effectual Decree for a compleat Partition of the whole Estate, binding all Parties interested in the Estate.

The first Consideration is, whether, if the Owner of the Inheritance of this Share had been a Party, the Plaintiff, as Owner of the Term of Five Hundred Years, entitled to Partition at Law and in this Court commensurate to his Interest, could compel him to join in this Partition; and pray this Relief, against his Will, that he might be decreed to concur with the other Parties in making Partition of this Estate, not for a Term of Years only, but for ever. No Authorities were cited on either Side.

It

1813.
BARING
v.
NASH.

No Objection to a Partition from the Minuteness of the Interest, the Inconvenience, Difficulty, or Reluctance of the other Tenants in Common.

Under a Bill for Partition no Costs to the Hearing. Costs of the Partition and Conveyance in Proportion to the Interests.

It is clear, the absolute Owner of a Tenth Part may compel the Owners of the other Nine to concur with him; and there would be no Objection from the Minuteness of this Interest, the Inconvenience, or the Reluctance of the other Tenants in Common, if no Objection could be taken to the Plaintiff's Title: Partition being Matter of Right: whatever may be the Inconvenience and Difficulty: *Parker* v. *Gerard* (a), and *Warner* v. *Baynes* (b); and the Habit of the Court is not to give Costs to the Hearing, and to divide the Expence of the Conveyance and Partition in Proportion to the Interests (c).

The Question is, whether the Lessee for Years of One Tenth Part has the same Right and Equity against the Owner of the Inheritance of that Tenth; and clearly the Lessee has not the same Right to compel that Owner to concur. As between the Lessee and the Remainder-man in Fee they are not as Tenants in Common. They between them represent the absolute Interest in that Tenth Part: but each has a separate, independent, Interest; and the Proceeding of the one can neither avail, nor bind, the other. As the Owner of the Inheritance therefore cannot be compelled to join at the Instance of the Lessee, a permanent Partition cannot take place, if the Owner of that Tenth Part will not concur. If therefore he was a Party no Relief could be prayed against him: nor would he be bound by the Partition; or any Right of his precluded to consider the Freehold as undivided notwithstanding any Division of the temporary Interest. For that Purpose the Owner of the Inheritance of this Share is not a necessary Party.

(a) *Amb.* 236.
(b) *Amb.* 589.
(c) *Agar* v. *Fairfax*, *Agar* v. *Holdsworth*, 17 *Ves.* 533.

Still

1813.
BARING
v.
NASH.

Still however the Question remains, whether, the Owner of the Inheritance not being a Party, a Court of Equity will grant a Partition at the Instance of the Lessee for Years; or leave him to Law, if it cannot interpose effectually for the Purpose of a permanent Partition; and the Inconvenience of a temporary Partition may be urged; creating, as the Freehold is not to be divided, the Necessity of coming again after the Expiration of the Term: but against this Partition no Authority was cited: nor can I find any Authority, that this Application for a Partition cannot be made by a Person, having a limited Interest.

Concurrent Jurisdiction of Equity upon Partition.

Then how does it stand upon Principle? Courts of Equity have a concurrent Jurisdiction with Courts of Law upon Partition; more convenient, where the Interest is much divided. With that concurrent Jurisdiction is a Court of Equity to adopt the Principle, which prevails at Law, or to act upon a different Principle? Originally Tenants in Common and joint Tenants could not have compelled the others to come to a Partition, which was remedied by the Statute 31 *Henry* 8, giving them the same Right, that Parceners had; and in the following Year that was extended to Persons, holding limited Interests only, for Life or Years. From that Time therefore, whatever is the Inconvenience of these partial Partitions, the Law has been established, that a Tenant for Years, though he has only that limited Interest, may compel Partition by Writ; and if that is clear, a Court of Equity cannot upon the Inconvenience of a temporary Partition permit a Demurrer to a Bill by a Plaintiff, having a Quantity of Interest, that would entitle him to the Writ.

Partition between Tenants in Common and joint Tenants by Stat. 31 *Hen.* 8: extended by Stat. 32 *Hen.* 8, to limited Interests, for Life or Years; and the same Right in Equity by Bill as at Law by Writ.

From the general Authorities nothing is to be found contradicting this; and there is something to be collected, which confirms it. In the Case of *Wells* v. *Slade* (a), the

(a) 6 *Ves.* 498.

Lord

1813.
BARING
v.
NASH.

Lord Chancellor says; "At all Events you are entitled to "a Partition during the Life of the Tenant for Life;" certainly conceiving, that there may be a limited Partition during a Tenancy for Life; and I cannot perceive any Distinction in this respect between such an Interest and a Term of Years: both give equal Title to the Writ under the Statute 32 *Henry* 8.

In the Case of *Turner* v. *Morgan* (a), the *Lord Chancellor* says, "It cannot be denied, that a Partition is due "now under the Statute, to divide this Species of Inheritance; and I know no Rule but by considering the "Commission as due in a Case, where the Writ would "lie;" certainly referring to the Rule of Law, by Analogy to which the Conduct of a Court of Equity should be regulated: these Authorities establishing the Principle, that a Rule of this Kind, involving the Right of an Individual, should be the same in both Courts; and therefore Tenant for Years, if he would be entitled to Partition at Law, ought to have it in Equity.

The only Authority, that appears to consider the Proceeding by a Bill for Partition as Matter, not of Right, but of Discretion, is a Passage in *Cartwright* v. *Pulteney* (b); where Lord *Hardwicke* says, "the Plaintiff "must shew a Title in himself in a Moiety, and not "alledge generally, that he is in Possession of a Moiety; "and this is stricter than a Partition at Law where Seisin "is sufficient."

Discretion in Equity to refuse Partition upon a suspicious Title: but, if clear, as the Writ would lie the Commission is due of Right.

This must be taken with the Context. It is stated to be discretionary, where there are suspicious Circumstances in the Plaintiff's Title; as in that Case a Suspicion of

(a) 8 *Ves.* 143.

(b) 2 *Atk.* 236.

Forgery.

Forgery. Where the legal Title is under such suspicious Circumstances, a Court of Equity may well pause in directing Partition: but if the Title is clear, a Partition is Matter of Right; and it is expressly stated in *Parker* v. *Gerard (a)*, that there is no Instance of not succeeding in such a Bill, but where there is not Proof of Title in the Plaintiff; and in the Case of *Cartwright* v. *Lord Bath*, the Court gave Leave, and Time for the Plaintiff to make out his Title.

1813. BARING v. NASH.

Therefore both upon Principle and Authority this Plaintiff's Title to the Term being clear, and liable to no Objection, he is under no Necessity of making the Owner of the Inheritance of this Tenth Share a Party: nor would it be proper to do so; against whom no Relief could be had, and the Discovery would be useless. The Plaintiff is therefore entitled to the same Partition here, to which he would clearly under the Statute be entitled at Law. Upon these Grounds this Demurrer must be over-ruled.

(a) *Amb.* 236.

TABLE

TABLE

OF

CONTENTS.

APPEAL.

APPEARANCE.

APPOINTMENT.

ASSIGNMENT.

AUCTIONEER.

B.

BANKRUPT.

22. No

BOND.

BOND.

C.

CHARGE.

CHARITY.

CHARITABLE USES.

COMMISSION.

COMPENSATION.

CONDITION.

CONFIRMATION.

CONSIDERATION.

CONSTRUCTION.

CONTEMPT.

CONTINGENT REMAINDERS.

CONTRIBUTION.

CONVERSION.

CORPORATION.

for

DEMURRER.

DEMURRER.

DEVISE.

DISCOVERY.

DISMISSION.

DOWER.

ELECTION,

E.

ELECTION, *to sue.*

EVIDENCE.

EXAMINATION.

EXCEPTION.

EXECUTORS.

F.

FAMILY COMPROMISE.

FORFEITURE.

FRAUD.

FRAUDS, (*Statute of.*)

H.

HEIR.

I.

ILLEGITIMATE CHILD.

ILLUSORY APPOINTMENT.

IMMORALITY.

IMPLICATION.

INFANT.

INJUNCTION.

JURISDICTION.

JURISDICTION.

L.

LEGACY.

LESSOR AND LESSEE.

LETTER MISSIVE.

LICENCE.

LIMITATION.

LIMITATIONS (*Statutes of.*)

LUNACY.

M.

MAINTENANCE.

MARRIAGE.

MISAPPLICATION.

MISTAKE.

MODUS.

MONEY.

MORTGAGE.

NE EXEAT REGNO

4. Writ

REVOCATION.

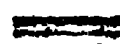
 2. Refusal

TITLE.

T.

TRUSTEE.

6. Purchaser



W.

WARD OF COURT.

WILL.

END OF THE FIRST VOLUME.

S. Brooke, Printer,
35, Paternoster-Row, London.

LAW BOOKS JUST PUBLISHED,

BY

REED and HUNTER.

---

1. A *New Justice* of the *Peace*, a *Practical Exposition* of the *Law* relating to the Office and Duties of a Justice of the Peace, continued to the End of Trinity Term 53 *Geo.* III. by *William Dickinson*, Esq. Barrister at Law, and for more than thirty Years an acting Magistrate in the Counties of Nottingham and Lincoln. 2 Vols. 8vo. Price 2l. 1s. Boards.

*** A Work upon the Duties of a Justice of the Peace, compressed into a reasonable Compass by an experienced Magistrate, divested of all unnecessary Matter, so as to shew to Gentlemen in the Commission of the Peace how to act at the Moment, has long been a Desideratum: and the Necessity of a Work like the present has been felt by the Editor, during an actual Practice of thirty Years in two of the most populous Counties of *England*; and it is hoped, without wishing to detract from any other Work of the same Nature, that this will be found fully to answer what has been so anxiously attempted, viz. to instruct young Magistrates particularly in their Duty, and facilitate to the more experienced the finding of any Information they may require, by having every Thing relating to the Office brought at once under their View.

The Index has also been formed in such a Manner as to avoid Prolixity, which frequently perplexes, and yet has been made sufficiently full to answer all the Purposes of an easy Reference.

2. Volume the First, Royal Octavo. Price 1l. 10s. Boards, of a *Digest* of the *Pleas* of the *Crown*, by *John Frederick Archbold*, Esq. of Lincoln's Inn.

3. In One Vol. 8vo. Price 10s. Boards. *A Compendium of the Law of Evidence.* Fourth Edition, with considerable Additions, by *T. Peake*, Esq. Barrister at Law.

4. In Two Volumes, Royal Octavo, Price 2l. Boards. *Reports* of *Cases* argued and determined in the Court of King's Bench, in the 19th, 20th, and 21st Years of Geo. 3d, by the Right Hon. *Sylvester Douglas*, *Baron Glenbervie*. The Fourth Edition, by *Wm. Frere*, Esq. Serjeant at Law.

5. A *Practical Treatise* on *Charter-parties* of *Affreightment*, *Bills* of *Lading*, and *Stoppage* in *Transitu*, by *Edward Lawes*, Esq. of the Inner Temple, Barrister at Law. In One Vol. Royal 8vo. Price 1l. 1s. Boards.

6. *Vesey* and *Beames's Reports*, Vol. I. Parts 1 and 2, Price 15s. a new Series of *Cases* in *Chancery*, commencing Michaelmas Term, 1812.

7. An *Enquiry* in the *Nature* of the *Trading* as a *Scrivener*, by *George Rose*, Esq. of the Inner Temple, Barrister at Law. Price 1s. 6d.

8. *Reports* of *Cases* in *Bankruptcy*, by *George Rose*, Esq. of the Inner Temple, Barrister at Law, Vol. I. Price 1l. 4s. 6d. Boards.

9. A *Cursory Enquiry* into the *Expediency* of *Repealing* the *Annuity Act*, and raising the legal *Rate* of *Interest*. In a Series of Letters, by *E. B. Sugden*, Esq. of Lincoln's Inn, Barrister at Law.

10. In Three Vols. Royal 8vo. Price 5l. 12s. Boards, a new Edition, being the Second, considerably enlarged and improved, of *An Analytical Digested Index* of the REPORTED CASES in the several COURTS of EQUITY, and the *High Court* of *Parliament*, from the earliest authentic Period to the present Time; to which are now added, the Decisions of the several *Courts* of *Equity* in *Ireland*, and of the *High Court* of *Parliament* in that Kingdom, after the Restoration of the Appellate Jurisdiction, with a Repertorium of the Cases, doubly and systematically arranged, by *Richard Whalley Bridgman*, Esq.

11. The *Bankrupt Laws*, by *William Cooke*, Esq. of Lincoln's Inn, Barrister at Law; Volume the First, containing Extracts of the Statutes relating to Bankrupts, and Determinations in the Courts of Law and Equity, the Sixth Edition, with Alterations and Additions, including the Author's more recent Notes, and the Cases down to the present Period. By *William Potts Gregg*, Esq. of the Middle Temple, Barrister at Law, and Commissioner of Bankrupts. Price 1l. 5s. Boards.

12. A *Treatise* of the *Law relative to Merchant Ships* and *Seamen*, in Four Parts: Part I. Of the Owners of Merchant Ships; II. Of the Persons employed in the Navigation thereof; III. Of the Carriage of Goods therein; IV. Of the Wages of Merchant Seamen. By *C. Abbott*, Esq. of the Inner Temple, Barrister at Law. Price 16s. in Boards.

13. *Tables* exhibiting *the various Particulars requisite to be attended to* in pursuance of the *Standing Orders* of the *Two Houses of Parliament*. in soliciting such *Private Bills* as usually commence in the *House* of *Commons*. By *David Pollock*, Esq. of the Middle Temple, Barrister at Law. Price 2s. 6d. on a Sheet.

14. A *Supplement* to *Bibliotheca Nova Legum Angliæ*. Price 6d. compiled by W. REED; of whom may also be had the above Catalogue, Price 7s. Boards. The Arrangement of this Catalogue has been approved of, as superior to any similar Publication, and, with the Supplement, will be found to contain an accurate Account of more Law Works than any Catalogue now extant.

15. *Attorney's Practice Epitomized*; or, the Method, Fines, and Expences of Proceedings in the Courts of King's Bench and Common Pleas, from the Commencement of a Suit to the Trial, final Judgment, and Execution; so advantageously placed in opposite Columns, as to shew at one View, the Agreement or Difference in the Practice of the said Courts. Price 3s. in Boards, or 4s. half bound and interleaved.

16. A New Edition of *The Commentaries of Sir William Blackstone*, handsomely printed in Four Volumes, Royal 8vo. (dedicated to *C. Butler*, Esq.) with Analyses, Epitome of the whole Work, and Notes, by *J. F. Archbold*, Esq. Price, in Boards, 3l. 16s.

17. In 8vo. Price 18s. Boards, Vol. I. of a *Practical Treatise* of the *Law* of *Elections*, relating to *England*, *Scotland*. and *Ireland*, by *William Thomas Roe*, Esq. of Lincoln's Inn, Barrister at Law. This Volume contains Reports of the Cases of the Borough of Liskeard, 1807; of the Boroughs of Glasgow, Dumbarton, Renfrew, and Rutherglen, 1807; Case of the Boroughs of Wick, Tain, Dingwall, Dornock, and Kirkwall, 1807; Case of the Boroughs of Linlithgow, Selkirk, Lanark, and Peebles, 1807; the Case of Dungarvon, 1808.

Also, an *Appendix*, Price 18s. Boards, to a *Treatise* on the *Law* of *Elections*; containing Acts relating to Controverted Elections, &c. &c. the *Scots* and *Irish Statutes*, and *Forms* and *Precedents*, by *William Thomas Roe*, Esq. of Lincoln's Inn, Barrister at Law.

... Vols. 8vo. Price 1l. 16s. Boards, a *Treatise* on the *Law* concerning ...atics, and *other Persons Non Compotes Mentis*, in Two Parts: with an ... containing the *Statutes* relating to *Lunatics*, the Practice on Pro... ...n Lunacy, and a Collection of Lunatic Petitions, with the Orders

of the Chancellor thereon, by *George Dale Collinson*, A. M. of Lincoln's Inn, Barristerat Law.

20. In 1 Vol. 8vo. Price 9s. Boards. *Rudiments of the Laws of England*, designed as a Preparatory Study for Persons entering the Profession, is a Compendium to strengthen the Memory of those who have studied the Law, and to convey a general Idea of Jurisprudence to all Classes of People. By *F. M. Van Heythuysen*, a Member of the Honorable Society of Lincoln's Inn.

21. In 8vo. Price 10s. 6d. Boards. *A Treatise on the Action of Ejectment*: containing the Principles and Practice of the Action: its Application between Landlords and Tenants, particularly as illustrative of *Notices* to *Quit*, and the Modes of Proceeding on the Forfeiture of a Lease; the Evidence necessary to support and defend it, and a concise Account of the resulting Action for Mesne Profits. By *John Adams*, of the Middle Temple, Esq. Barrister at Law.

22. A brief View of the *Writ Ne Exeat Regno*, with practical Remarks upon it, as an equitable Process. By *John Beames*, Esq. of Lincoln's Inn, Barrister at Law, Translator of *Glanville*, &c. In 8vo. Price 5s. Boards.

23. A *Vindication* of the *Law of England*, shewing that Mesne Lords, Derivative Lessors, or Middle Men, have no Right, either at Common Law, or under any Statute, to levy Distress. Price [illegible]s. 6d. sewed.

24. A *Translation* of *Glanville*, by *John Beames*, Esq. of Lincoln's Inn, Barrister at Law. To which are added Notes. 8vo. Price 15s. Boards.

25. The *Philosophy of Evidence*, by *Daniel M'Kinnon*, Esq. of Gray's Inn, Barrister at Law, in 8vo. Price 5s. Boards.

26. The *Law* of *Uses* and *Trusts*, by the late Lord Chief Baron *Gilbert*, the Third Edition, with Notes and References, an Introduction, &c. By *Edward Burtenshaw Sugden*, Esq. of Lincoln's Inn, Barrister at Law; Royal 8vo. Price 1[illegible]s. Boards.

27. A *Dictionary* of the *Practice in Civil Actions*, in the *Courts of King's Bench* and *Common Pleas*, together with *Practical Directions* and *Forms*, distinctly arranged under each Head. By *Thomas Lee*, Esq. of Gray's Inn. 2 Vols. Price [illegible] Boards.

28. The *Complete Practical Under-Sheriff*, comprehending the Duties of the Office, as exercised by the Sheriff in Person, or by his Under Sheriff, from his first coming into the Office to the passing of his Accounts and obtaining his *Quietus*, in a regular and progressive Way as the Subjects arise, being a correct Epitome of the Practice of the Under Sheriff, in the various Stages of his Duty throughout the Year, with full Instructions as to the Election of Members of Parliament, Coroners, and Verderors of Forests, Precedents of Returns of Writs, &c. intended as a Guide not only to the Under-Sheriff, but to the Profession in general. Price 12s. Boards.

29. The *Crown Circuit Companion*, Eighth Edition, into which has been incorporated the Work formerly published under the Name of the *Crown Circuit Assistant*: both Works have been carefully revised, and such Additions made thereto as modern Statutes and Decisions rendered necessary; in 1 Vol. Royal 8vo. Price 1l. 1s. Boards.

30. The *Maltster's Guide*, containing the Substance of the several *Excise Laws* and *Regulations* to which Maltsters are subject, and also a Variety of Information relating to the Excise in general, 8vo. Price 6s. Boards.

31. Index to the First Fourteen Volumes of *Vesey*, junior's, *Reports* in *Chancery*, by *Robert Bell*, Esq. Price 18s. in Boards.

32. *Fearne's Essay* on the *Learning* of *Contingent Remainders*, and *Executory Devises*, a new Edition, by *Charles Butler*, Esq. (being the Sixth) in 1 Vol. Royal 8vo. Price 19s. Boards.

33. *Coke* on *Littleton*, a new Edition, (being the Sixteenth) with *Hargrave*

and *Butler's* Notes, corrected to the present Time, by *C. Butler*, Esq. and *J. C. Wye*, Esq. 3 vols. Royal 8vo. Price 2l. 17s. in Boards.

34. *Sugden's* (*E. B.* Esq.) *Series* of *Letters* to a *Man* of *Property*, on the Sale, Purchase, Lease, Settlement, and Devise of Estates, 8vo. Second Edition. Price 5s. in Boards.

35. *Bibliotheca Nova Legum Angliæ*; or, a *Complete Catalogue* of *Law Books*, arranged upon a Plan entirely new, with many Observations on the Authority of the Reporters and other Law Writers, compiled and corrected to the present Time, by WILLIAM REED; closely printed in 1 Vol. 12mo. Price 7s. Boards.

36. *Lovelass* (*Peter*,) on *Intestacies* and *Last Wills*, shewing, in a plain, clear, easy, and familiar Manner, how a Man's Family or Relations will be entitled to his real and personal Estate by the Laws of England and Province of York, containing an Explanation of the Mortmain Act. Tenth Edition, with Corrections and Additions to the present Time. Price 9s. Boards.

37. *Brown's Reports* of *Cases* argued and determined in the High Court of Chancery, during the Time of Lord Chancellor *Thurlow*, and of the several Lords Commissioners of the Great Seal, from 1778 to 1794, Third Edition, corrected, with an Appendix of contemporary Cases, and Additions of References to more modern Determinations, in 4 Vols. Royal Octavo. Price 4l. 4s. in Boards.

38. *Cowper's Reports* in the *King's Bench*, from Hilary Term, 14 *Geo.* 3. 1774, to Trinity Term, 18 *Geo.* 3. 1778, both inclusive. Second Edition, 2 Vols. Royal Octavo. Price 18s. in Boards.

39. *Statutes at Large*, by *Ruffhead*; or *Runnington continued*, by *T. E. Tomlins*, Esq. in Quarto.

*** The Statutes are published shortly after the Close of every Session. Gentlemen wishing to have them sent regularly, may depend upon receiving them, as soon as published, by leaving their Orders at No. 26, Bell Yard, Lincoln's Inn.

40. *Statutes at Large*, by *Pickering*; these are continued in the same Manner as those in Quarto.

41. *Sugden's* (*E. B.* Esq.) *Practical Treatise* of *Powers*. 1 Vol. Royal Octavo. Price 19s. in Boards.

42. *Supplement* to *Viner's Abridgment* of the *Law*, containing the modern Determinations in the Courts of Law and Equity, to the End of the Year 1806, in Six Volumes, Royal Octavo. Price 5l. 5s.

43. *Vesey's Reports* in *Chancery*, Vol. XIV. Parts the Second and Third. Price 15s. sewed.

44. *Vesey's Reports* in *Chancery*, Vol. XV. Price 24s. Boards.

45. *Vesey's Reports* in *Chancery*, Vol. XVI. Price 1l. 3s. 6d. Boards.

46. *Vesey's Reports* in *Chancery*, Vol. XVII. Price 1l. 4s. 6d. Boards.

47. *Vesey's Reports* in *Chancery*, Vol. XVIII. Part I. Price 7s. 6d. sewed.

48. *Vesey's* and *Beames's Reports* in *Chancery*, Vol. I, Parts I, II. 15s. sewed.